TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [illegible]

No. 208

THE GULF, COLORADO & SANTA FE RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

W. R. DENNIS.

IN ERROR TO THE COUNTY COURT OF MILAM COUNTY, STATE OF TEXAS.

FILED FEBRUARY 8, 1899.

(20,065.)

(22,005.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 429.

THE GULF, COLORADO & SANTA FE RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

W. R. DENNIS.

IN ERROR TO THE COUNTY COURT OF MILAM COUNTY, STATE OF TEXAS.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DECEMBER 1, 1910.

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& 2 THE STATE OF TEXAS,
County of Milam:

At a term of the County Court, begun and holden within and for e County of Milam at Cameron on the 6th day of December A. D. 909, and which adjourned on the 25th day of December 1909, en Hon. Judge Watson thereof presiding, the following cause me on for trial, to-wit:

No. 1744.

W. R. DENNIS, Plaintiff,
vs.
G., C. & SANTA FE RAILWAY COMPANY, Defendant,

Transcript of Judgment.

Justice Court, Precinct No. —, —— County, Texas.

No. 54.

W. R. DENNIS, Plaintiff,
vs.
LF, COLORADO & SANTA FE RAILWAY COMPANY, Defendant.

J. S. Hearrell, Plaintiff's Att'y.
W. W. Chambers, Defendant's Att'y.

Justice's Fees.

keting suit	.10
ing 2 citations	1.00
ing 1 subpœna 7 names	.65
ing one bond	.50
ng 3 papers	.15
aring 7 witnesses	.70
ording verdict	.25
. final judgment	.50
ing appeal bond	.25
nscript of docket 1	.50
ing cost and copy	.10
	$5.60

Constable's Fees.

ing 1 citation	.70
ing 7 subpœnas	3.50
age	2.50
ness Fees	8.30
Total Costs	$20.60

Suit upon claim for $75.00 of date 26th October, due — interest —— filed 8th day of Oct. 1909: citation issued the 8th day of Oct. 1909, returnable to Oct. Term 1909 and placed in the hands of M. M. Reese, returned 11th: executed 8th day of Oct 1899. On this the 21st day of Oct. 1909, the above entitled and numb-red cause *coming* on to be heard, and plaintiff appeared and announced ready for trial and defendant came not but wholly made default. Therefore it appears to the court that the said defendant had been duly and legally summoned to appear and answer herein.

The evidence submitted is the opinion that the law is with the plaintiff wherefore it is ordered adjudged and decreed by the court that plaintiff W. R. Dennis do have and recover of and from the Gulf Colorado and Santa Fe Railroad Company the defendant the sum of $75.00 and the further sum of 20.00 att'y's fees, in the sum of 95.00 and for all cost for all of which execution may issue.

THE STATE OF TEXAS,
County of Milam:

I, J. D. Ruby Justice of the Peace, do hereby certify that the above and foregoing is a true and correct transcript of the entries on my docket, on page 54 in the cause of W. R. Deenis vs. Gulf Colorado and Santa Fe Railway Company.

Witness my hand this the 29 day of October 1909.

J. D. RUBY.
Justice of the Peace, Precinct No. 3, Milam Co., Texas.

No. 54.

4 No. 54. Transcript of Judgment, from Justice's Court. W. R. Dennis vs. Gulf Colorado and Santa Fe Railway Company. Filed this the 5 day of Nov. A. D. 1909. Jeff T. Kemp County Clerk, Milam County, Texas.

5 In the Justice's Court of Precinct No. 3, Milam County, Texas.

Before the Honorable, the Justice of the Peace in and for the said Precinct.

No. 54.

W. R. DENNIS, Plaintiff,
versus
GULF, COLORADO & SANTA FE RAILWAY COMPANY, Defendant.

Whereas W. R. Dennis the plaintiff, recovered a judgment against the Gulf Colorado & Santa Fe Railway Company the defendant in the above entitled and numbered cause, on the 21st day of October A. D. 1909 before the Honorable Justice of the Peace in and for Precinct No. 3 in the County of Milam, State of Texas for the sum of $95.00,) Nniety five & 00/100 Dollars with interest

thereon from said date at the rate of six per cent per annum, besides costs of suit, from which judgment the Said Gulf Colorado & Santa Fe Railway Company has appealed to the County Court of Milam County State of Texas.

Now therefore the said Gulf Colorado & Santa Fe Railway Company as principal and the other subscribers hereto as sureties acknowledged themselves bound to pay to the said W. R. Dennis the sum of ($250.00) Two Hundred Fifty Dollars conditioned that the said Gulf Colorado & Santa Fe Railway Company shall prosecute said appeal to effect, and shall pay off and satisfy the judgment which -ay be rendered against the said Gulf Colorado & Santa Fe Railway Company on such appeal.

Dated at Galveston, Texas this 25th day of October A. D. 1909.

GULF, COLORADO & SANTA FE RAILWAY COMPANY,
By TERRY CALVIN & MILLS, *Its Solicitors.*
JOHN SEALY.
H. O. STEIN.

THE STATE OF TEXAS,
County of Galveston:

I, J. C. Gengler Clerk of the District Court in and for said County of Galveston, do hereby certify that Jno. Sealy and H. O. Stein whose names appear signed to the annexed bond, are good ample security for the amount therein stipulated: that they have property in said County subject to execution to a larger amount and that if said bond was offered to me for approval the same would be accepted and approved.

To certify which I hereunto set my hand and the impress of my official seal at my office in the City of Galveston on this the
6 25th day of October 1909.

[SEAL.] J. C. GENGLER.
Clerk District Court, Galveston County,
By W. L. HANSCOM, *Deputy.*

No. 54. W. R. Dennis, Plaintiff, versus Gulf, Colorado & Santa Fe Railway Co., Defendant. Appeal Bond. Filed October 27th, 1909. J. D. Ruby, J. P. Pr. No. 3. Milam Co., Texas. Approved October 27th, 1909. J. D. Ruby, J. P. Pr. No. 3, Milam Co., Texas. Filed this the 30th day of Oct. A. D. 1909. Jeff T. Kemp, County Clerk Milam County, Texas.

7 In Justice Court, Precinct No. 3, Milam County.

No. 54.

The State of Texas to the Sheriff or any Constable of Milam County, Greeting:

You are hereby commanded to summon the Gulf Colorado and Santa Fe Railway Company if to be found in your county, to be and

appear before me, the undersigned, a Justice of the Peace in and for the County of Milam at my office in Milano Precinct No. 3, at the next regular term of said court, to be begun and holden on Thursday 21st day of Oct. 1909 at 10 o'clock A. M. then and there to answer the suit of W. R. Dennis Plaintiff against G. C. & S. F. Ry. Co. defendant, filed on the 8th day of Oct. 1909 file No. 54 for the sum of $75.00 Dollars a claim for damages.

Plaintiff alleges that heretofore to-wit: on the 26th day of Aug. A. D. 1909 he was the owner of one Jersey three year old cow. That on said date the defendant by its negligence prior to said time had permitted its right of way to be down and remain down, and that said cow was permitted to get into said enclosure and on the track of the defendant, or that defendant by its neglect and want of due care permitted its certain cattle guard about 1½ miles South of Milano to be out of repair and in such a condition that stock and cattle could and did cross over same, that by one or both of said negligent acts of the defendant as aforesaid plaintiff's cow got on to the defendant's railroad track and roadbed and was on the said 26th day of Aug. 1909 run over and killed by defendant's train and engine negligently.

Wherefore plaintiff asks that defendant be served with a copy of this citation and that on the final hearing hereof he have judgment in the sum of $75.00 and all costs and all general and special relief he may be entitled too & also $20.00 att'y's fees.

Herein fail not but of this writ make due return showing how you have executed the same.

Witness my official signature this 8 day of Oct, 1909.

J. D. RUBY,
Justice of the Peace, Precinct No. 3, Milam County, Texas.

8 *Constable's Return.*

Came to hand on the 8th day of Oct. 1909 at 7 o'clock P. M. and executed on the 8th day of Oct. 1909 be delivering to the Gulf Colorado & Santa Fe Railway Company by delivering a copy of this writ to Lee Sparrow its local agent at Milano in Milam Co., Texas, the within named defendant in person a true copy of this Citation.

M. M. REESE,
Constable Precinct No. 3, Milam County, Texas.

Fees:

Serving Copy	.70
Mileage	.10
Total	.80

Came to hand 8 day of Oct. 1909 and executed 8 day of Oct. 1909 by delivering to the Gulf Colorado and Santa Fe R. R. Co. to Lee Sparrow their agent in person a true copy of this citation.

Fees:

Serving copy	.70
Mileage 2 Miles	.10
Total	.80

M. M. REECE,
Constable Precinct No. 3, Milam County.

Filed this the 5 day of Nov. A. D. 1909. Jeff T. Kemp, County Clerk, Milam County, Texas. Citation in Justice Cou-t Milam County, Texas.

9 *Pleadings of Defendants.*

On trial of this cause the defendant plead:
General Demurrer to Plaintiff's Allegations,
Special Exception to that portion of plaintiff's pleadings in which he seeks to recover attorney's fees,
General Denial,
Plead specially, First that animal in question was struck on a public road crossing: second that the cattle guards on each side of said public road crossing were in good condition and repair, and that the right of way fence in the vicinity was in good repair.

10 In the County Court, Milam County, December Term, 1909.

No. 1744.

W. R. DENNIS
vs.
G., C. & S. FE RY. CO.

Gentlemen of the Jury: In this case the plaintiff sues the defendant for damages for alleged negligence in permitting its right of way fence to be down, and its cattle guard to be out of repair and in such condition that his cow could cross same, and that by one or both of said alleged negligent acts of the defendant his cow got on to the right of way of the defendant about a mile and a half below Milano, and was killed by a moving train or engine of the defendant, and he also prays for the sum of twenty dollars attorney's fees.

The defendant denies all and singular the allegations of the plaintiff. Now if you believe from the evidence that the defendant failed to exercise ordinary care to keep its fence around its right of way in such condition as to turn and keep out cattle of the class as the one in question, and of the ordinary disposition of such animals: Or if you find from the evidence that it failed to exercise ordinary care to keep and repair its cattle guard in question so as to turn or keep out cattle of the class as the one in question and

of the ordinary disposition of such animals and that the cow in question went into the right of way of defendant through its right of way fence at or near the vicinity of the place where she was found dead, or that she went into said right of way over said cattle guard or onto said cattle guard and as the direct proximate cause thereof was struck and killed by a moving engine or train of defendant, then your verdict should be for plaintiff, unless you find — defendant under further instructions hereinafter given you.

You are instructed that the defendant could not fence its right of way at -he public crossing where the cow was found dead, and in case you should find and believe from the evidence that the cow was struck by the moving engine or train of defendant at said crossing, then your verdict should be for the defendant.

If you find for the plaintiff your verdict should be for such sum as you believe from the evidence was the reasonable market value of said cow at the time and place she was killed, and in case you should find from the evidence that there was no market value for such cow at the time and place where she was so struck and killed then the measure of damages is the value of said animal in the nearest market to said place where she could be disposed of in the ordinary course of business.

If you find for the defendant y-u will say so and no more.

If your verdict for the plaintiff should be for as much as the sum of $75.00, you will also allow him the additional sum of $20.00 as attorney's fees. In case you should not find for plaintiff damages for as much as $75.00 you will not allow any sum as attorney fees.

The burden of proof is upon the plaintiff to prove every material allegation by a preponderance of the evidence.

The jury are the exclusive judges of the facts proven, the credibility of the witnesses, and the weight to be given to their testimony, but it is your duty to receive the law from the charges of the court, and to be governed thereby.

JOHN WATSON,
Judge Presiding.

No. 1744. W. R. Dennis vs. G. C. & S. F. R. R. Co. Charge of the Court. Filed December 15th. 1909. Jeff T. Kemp, County Clerk, Milam County, Texas.

In the County Court of Milam County, Texas, December Term, A. D. 1909.

No. 1744.

W. R. DENNIS
vs.
G., C. & S. F. RY. CO.

Defendant's Special Charge No. 3.

Gentlemen of the Jury: You are instructed that it was the duty of the defendant railway company in this case to keep the cattle

guard in question in such condition and repair that it would effectively turn back animals of the class as the one in question, and of the ordinary disposition*On* of such animals, and if the same was not in a condition dangerous and inviting to such animals, and was effectually performing said office of so turning said class of stock: then you are instructed that even if the animal in question was killed on said cattle guard, such does not constitute negligence in the defendant company, and you will find your verdict for said defendant.

JOHN WATSON,
County Judge Presiding.

12

CHAMBERS & BASKIN,
Att'ys for Defendant.

No. 1744. W. R. Dennis vs. G. C. & S. F. Ry. Co. Defendant's Special Charge Number Three. Filed December 15th 1909. Jeff T. Kemp, County Clerk, Milam Co., Texas.

"We the Jury find for the Plaintiff W. R. Dennis against the G. C. & S. F. Ry. Co. and assess his damages at $75.00 & Attorney Fees in the sum of $20.00.

S. S. McLANE, *Foreman.*

13 In the County Court of Milam County, Texas, December Term, A. D. 1909.

No. 1744.

W. R. DENNIS
vs.
G., C. & S. F. RY. CO.

Defendant's Special Charge No. 1.

Gentlemen of the Jury: You are instructed that in arriving at the value of the animal in question in this case, you shall not consider any special value placed upon same by plaintiff, but shall consider only the market value of said animal which must be established by the evidence, and which shall consist of the value that would be placed upon her in the nearest market where she could be disposed of in the ordinary course of business.

Refused.

JOHN WATSON,
County Judge Presiding.

CHAMBERS & BASKIN,
Att'ys for Defendant.

Filed this Dec. 15th, 1909. Jeff T. Kemp Co. Clerk, Milam Co., Texas.

In the County Court of Milam County, Texas, December Term, A. D. 1909.

No. 1744.

W. R. DENNIS
vs.
G., C. & S. F. RY. CO.

Defendant's Special Charge No. 2.

Gentlemen of the Jury: You are not to consider, in arriving at your verdict in this case, any evidence relating to a defective fence in the vicinity of the killing of the animal.

Refused.

JOHN WATSON,
County Judge Presiding.

CHAMBERS & BASKIN,
Att'ys for Defendant.

No. 1744. W. R. Dennis vs. G. C. & S. F. Ry. Co. Defendant's Special Charge Number Two. Filed Dec 15th, 1909. Jeff T. Kemp, Co. Clerk, Milam Co., Texas.

14 In the County Court of Milam County, Texas.

No. 1744.

W. R. DENNIS
vs.
G., C. & S. F. RY. CO.

Defendant's Special Charge No. 4.

Gentlemen of the Jury: You are instructed that plaintiff cannot recover any thing for attorney's fees in this case.

Refused.

JOHN WATSON,
County Judge Presiding.

CHAMBERS & BASKIN,
Attorneys for Defendant.

No. 1744. W. R. Dennis vs. G. C. & S. F. Ry. Co. Defendant's Special Charge Number Four. Filed Dec. 15th, 1909. Jeff T. Kemp, Co. Clerk Milam Co., Texas.

In the County Court of Milam County, Texas, December Term, A. D. 1909.

No. 1744.

W. R. DENNIS
vs.
G., C. & S. F. RY. Co.

Defendant's Special Charge No. 5.

Gentlemen of the Jury: You are instructed not to consider, in arriving at your verdict any evidence of a defective cattle guard in this case, unless you first find that said defective cattle guard was the direct and proximate cause of the injury, to said animal.

Refused.

JOHN WATSON,
County Judge Presiding.

CHAMBERS & BASKIN,
Attorneys for Defendant.

No. 1744. W. R. Dennis vs. G. C. & S. F. Ry. Co. Defendant's Special Charge Number Five. Filed Dec. 15th, 1909. Jeff T. Kemp, Co. Clerk Milam Co., Texas.

15 In the County Court of Milam County, Texas, December Term, A. D. 1909.

No. 1744.

W. R. DENNIS
vs.
G., C. & S. F. RY. Co.

Defendant's Special Charge No. 6.

Gentlemen of the Jury: You are instructed that it is your duty to find a verdict for the defendant in this case if you find from the evidence that the animal in question was struck upon the crossing of a public road over defendant's railway track, unless you further find that defendant railway company failed to use ordinary care in running over its tracks the locomotive or cars which struck said animal, if you believe any such locomotive or cars did strike said animal.

Refused.

JOHN WATSON,
County Judge Presiding.

CHAMBERS & BASKIN,
Attorneys for Defendant.

No. 1744. W. R. Dennis vs. G. C. & S. F. Ry. Co. Defendant's Special Charge Number Six. Filed Dec. 15th, 1909. Jeff T. Kemp County Clerk, Milam Co., Texas.

In County Court of Milam County, Texas, December Term, A. D. 1909.

No. 1744.

W. R. DENNIS
vs.
GULF, COLORADO & SANTE FE RAILWAY COMPANY.

Be it remembered that upon the trial of the above numbered and entitles cause just after plaintiff had stated his pleadings to the judge and jury, and before any evidence was offered, defendant directed a special exception to that portion of plaintiff's pleadings wherein he sought to recover attorney's fees and requested the Court to strike out same, for the following reasons that same is violative of the Fourteenth Amendment to the Constitution of the United States in that it denies this defendant the equal protection of the law there given and guaranteed: that the Act of the Legislature, under authority of which attorney's fee was claimed is class legislation, and does not give this defendant the same right that is given to the plaintiff in the action: that under said Act of the Legislature
16 this defendant is *defendant is* not permitted to recover an attorney's fee in case plaintiff's claim is defeated.

Whereupon the Court over-ruled defendant's said exception to which action of the Court the defendant then and there in open Court excepted.

And the defendant here now tenders this its Bill of Exceptions No. 1 and asks that same be approved, signed, and ordered filed as a part of the record of this cause, which is accordingly done.

Examined and approved this the 30 day of December A. D. 1909.

JOHN WATSON,
County Judge Presiding.

O. K.
U. S. H.

No. 1744. W. R. Dennis vs. Gulf Colorado & Santa Fe Railway Company. Defendant's Bill of Exceptions Number One.

17 In County Court of Milam County, Texas, December Term, A. D. 1909.

No. 1744.

W. R. DENNIS
vs.
GULF, COLORADO & SANTE FE RAILWAY COMPANY.

Be it remembered that upon the trial of the above numbered and entitled cause, the following facts and none other were proven:

This case was originally tried in the Justice Court of Precinct Number Three of Milam County, Texas, and a judgment was therein rendered for plaintiff in the sum of Seventy-five dollars damages and Twenty Dollars attorney's fees, from which judgment defendant duly appealed said cause to the County Court of Milam County, Texas.

GEO. W. MEADOWS, a witness for the plaintiff, testified as follows: I live about a mile and a half south of Milano. I know Dr. Dennis, the plaintiff in this cause. On or about the 27th day of August, 1909, I saw Dr. Dennis' Jersey cow dead near the track and on the defendant's right of way, about a mile and a half south of Milano Junction, Milam County, Texas. I live about three hundred yards from this place. The cow was about forty or fifty feet south of defendant's cattle guard and near its railway track. The cattle-guard had the ends broken off of three ties on the side next to the road, and had been in that condition from eight to twelve months. I know that a horse went through this cattle-guard, and I had seen cattle tracks on the inside of the right of way in the inclosure. The defendant's fence had been down near the cattle-guard for nearly a year and was still down. The grass on the inside of the defendant's inclosed right of way was better and greener than that on the outside. I saw on this cattle guard cow hair and a clot of blood. This hair and blood was on the first and second ties, on the side of the cattle-guard next to the inclosure, and this is the only sign I saw on the cattle-guard. About thirty feet from the cattle guard I saw
18 evidences where she was drug on defendant's track. This was a well made deep red, short-horn two and a half year old cow, which I would call a splended good heifer.

W. R. DENNIS, Plaintiff, testified in his own behalf, as follows: The first knowledge that I had that my cow had been killed was on the evening of the 26th day of August, 1909. Mr. Meadows' little boy conveyed the information to me. Near the place where my cow was killed, the cattle-guard was in bad condition. The ends of three ties had been broken off on the side *where* the road crossing. The right of way fence of defendant near this cattle-guard was down so that cattle could go through it, and had been so for quite awhile. I have been grading up my cattle for the last twenty-two years. This young cow, or heifer, was three-fourths Jersey and one fourth Durham, and she was heavy with calf, was looking for her to bring one any day. She was worth from $75 to $100. I presented my claim in writing for the value of this cow, $75, to the authorized Agent of the defendant at Milano, Texas, thirty two days prior to the institution of this suit, and it had not been paid or satisfied; and I employed U. S. Hearrell, an attorney, to represent me in the trials of this suit. He filed suit for me in Justice Court of Precinct Three, Milam County, Texas. The mother of this cow gave two gallons of milk per day, and I do not know how much butter.

RAYMOND BEARD, a witness for plaintiff, testified as follows:

I live six or seven miles from Dr. Dennis. I have been engaged in the cattle business, buying and selling cattle, for six or seven years. I have sold milk cattle and beef cattle. I know of Dr. Dennis' cattle. This cow that was killed of Dr. Dennis' was worth from $75 to $100. I had not seen the cow for a year before she was killed. When I last saw her she was yearling.

T. C. FISHER, a witness for plaintiff, testified as follows:

I live near Milano, Texas. I am acquainted with Dr. Dennis and know his cattle, and have known them for a number of years. I have for several years been engaged in handling and selling milk cows and Jersey cows, and dairy cattle. I know Dr. Dennis' cow that was killed, and she was worth from $75 to $100.
19 An untried heifer whose mother would give about two gallons of milk, would ordinarily be worth about $50.

GEORGE BLAND, a witness for plaintiff, testified as follows:

A cow of the description as given by G. W. Meadows of Dr. Dennis' cow that was killed, was worth $75. A cow, with a calf, giving two gallons of milk per day, would not be worth $50.

It was agreed by attorneys of the parties, that $20 was a reasonable attorney's fee in this case.

J. C. BEARD, a witness for defendant, testified as follows:

I live in the neighborhood where Dr. Dennis lives. I have been raising cattle for a number of years, and selling them to the butcher Markets. A two and a half year old heifer out of a cow which gave two gallons of milk per day would be worth not to exceed $30. I do not know the value of milk cattle. I do not know the value of a milk cow three fourths Jersey and one fourth Durham. If there is any market for such cattle at Milano, I do not know it.

WM. MCDEES, a witness for defendant, testified:

I am in the cattle business at Milano, and have for the last six or seven years been dealing in buying and selling beef and milk cattle. I am generally acquainted with Dr. Dennis' cattle. I do not know the particular heifer in question, but from my knowledge of Dr. Dennis' stock, this heifer could not have been worth more than $30 at the very highest value, for milk purpose or any other purpose. A cow which will give two gallons of milk per day is not worth more than $35 at the outside.

C. M. BEARD, a witness for defendant, testified as follows:

I was the deputy Tax Assessor in the territory around Milano, for 1909, and assessed the property of Dr. W. R. Dennis, plaintiff here. He rendered cattle, four head, at $8 per head, and swore
20 to the rendition. I put the price on these cattle. Dennis did not price the cattle to me. I put down common cattle at $8 per head, and if people had valuable cattle, they raised the price or amount of the rendition. I am acquainted with the value of cat-

tle in my neighborhood, and a heifer of the description of Dr. Dennis' heifer is worth not over $30. I am speaking of beef cattle. I consider a cow that will not give over two gallons of milk a day worth not over $30 even as a milk cow. I do not know the value of a three quarter Jersey and a one quarter Durham.

W. A. BAGGETT, a witness for the defendant, testified as follows: I was a Section Foreman in the employe of the defendant at the time Dr. Dennis' cow was killed. The cattle guard at the point in question had the ends of three ties next to the road crossing gone. I think it was sufficient to turn stock. There was an excavation eighteen inches deep under the cattle guard. There was a place where cattle could go through the fence near the cattle guard.

ALF SMITH, a witness for defendant, testified as follows: I was a Section hand in the employe of the defendant at the time Dr. Dennis' cow was killed. The cattle guard at the point in question had the ends of three ties next to the road crossing gone. I think it was sufficient to turn stock. There was an excavation eighteen inches deep under the cattle-guard. There was a place where cattle could go through the fence near the cattle guard. There was some cow hair on the end of the cattle guard next to the public road crossing. A public road crossed the railroad just north of the cattle guard upon which this hair was found.

21 In County Court of Milam County, Texas, December Term, A. D. 1909.

N. 1744.

W. R. DENNIS
vs.
GULF, COLORADO & SANTE FE RAILWAY COMPANY.

Agreement.

It is hereby agreed that the foregoing four pages constitute a true and correct statements of all the facts proven in the trial of the above numbered and entitled cause at said term.

U. S. HEARRELL,
Attorney for Plaintiff.
A. H. CULWELL,
CHAMBERS & BASKIN,
Attorneys for Defendant.

Approval.

The above and foregoing agreement, statement of facts proved, signed by the respective attorneys for the parties thereto, having

this day been examined by me, is found in all things correct, and is hereby approved and ordered filed as a part of the record in this case.

JOHN WATSON,
County Judge, Milam County, Texas.

This the 27th day of December, A. D. 1909.

22 In the County Court of Milam County, Texas, December 14th, A. D. 1909.

No. 1744.

W. R. DENNIS
vs.
GULF, COLORADO & SANTA FE RAILWAY COMPANY.

This day, this cause coming on to be heard, came the plaintiff in person and by attorney, and came the defendant by its attorneys, and announced ready for trial, and a jury having been demanded thereupon came a jury of good and lawful men, to-wit, S. S. McLan and five others, who being duly impanelled and sworn to try said cause, after hearing the pleadings of the parties, the evidence, and the charge of the Court, returned into Court, on the 15th day of December A. D. 1909, the following verdict:

"We, the jury, find for the plaintiff, W. R. Dennis, against the G. C. & S. F. Ry. Co. and assess his damages at $75 & attorney's fees in the sum of $20.00.

S. S. McLANE, *Foreman.*"

It is therefore considered, ordered adjudged and decreed by the Court that plaintiff, W. R. Dennis, do have and recover of defendant, the Gulf, Colorado & Santa Fe Railway Company, the sum of $95, with interest thereon from this date until paid, at the rate of 6 per cent per annum, together with his costs in this behalf expended, and that he have his execution.

23 In the County Court of Milam County, Texas, December Term, A. D. 1909.

No. 1744.

W. R. DENNIS
vs.
GULF, COLORADO & SANTA FE RAILWAY COMPANY.

Now comes the defendant, the Gulf Colorado & Santa Fe Railway Company, by its attorneys, and prays the court to set aside the verdict and judgment heretofore rendered herein against it on the 15th day of December A. D. 1909, and to grant a new trial of this cause, for the following good and sufficient reasons to-wit:

1.

Because the Court erred in each and every paragraph of its charge to the jury, in this, that said paragraph of said charge incorrectly state- the law applicable to this cause and the evidence adduced herein, are upon the weight of evidence, give undue prominence to plaintiff's pleadings to *to* defendant's great prejudice, and are manifestly detrimental to the rights of this defendant.

2.

Because the court erred in failing and refusing to submit to the jury defendant's special charges Nos. 1, 2, 4, 5 and 6 for the reason that said charges were each and every one applicable to the evidence adduced in this cause, and each and every one correctly expounded the law covering the issue to which it was directed.

3.

Because the court erred in permitting counsel for plaintiff to indulge on improper argument before the jury, in this that he permitted counsel (U. S. Hearrell) to discuss to the jury proceedings had before the impanelling of a jury, in disposing of defendant's motion that plaintiff be required to give security for costs incurred upon the trial of this cause such argument being permitted over objection of this defendant, to which defendant saved its exception: all of which more fully appears in defendant's bill of exception No. hereby referred to and made a part hereof.

4.

Because the verdict rendered in this case is unconscionable, unreasonable and outrageous and wholly without support either in law the evidence adduced: and because the verdict shows incontrotibly on its face that it was engendered in prejudice and brought rth in entire indifference to the rights of this defendant in the ht of justice and the law.

5.

Because the Court erred in overruling defendant's general deurrer to pleadings of the plaintiff.

6.

Because the court erred in overruling defendant's special exception to that portion of plaintiff's pleadings praying for attorney's s under certain *rpoof* in this cause, which is more fully shown defendant's bill of exception No. 1 hereby referred to.

7.

Because the court erred in submitting to the jury the following agraph of its charge:

If you- verdict for the plaintiff should be for as much as the of $75.00, you will still allow him the additional sum of $20.00 ttorney's fees. In case you should not find for plaintiff damages

for as much as $75.00 you will not allow plaintiff any sum as attorney's fees" for the reason that same is on the weight of the evidence, and for the reason that same is violative of the Fourteenth Amendment of the Constitution of the United States, in that it denies this defendant the equal protection of the law there given and guaranteed: for the reason that the Act of the Legislature under authority of which this charge was given, is class legislation and does not give to this defendant the same right that is given to the plaintiff in the action: and for the reason that under said Act of the Legislature the defendant is not permitted to recover an attorney's fee in case plaintiff's claim is defeated.

Wherefore, defendant prays the court to grant this, its said motion and to set aside the verdict and judgment rendered herein against it on the 15th day of December A. D. 1909 and to order a new trial of this cause.

A. H. CULWELL,
CHAMBERS & BASKIN,
Attorneys for Defendant.

No. 1744. W. R. Dennis vs. G. C. & S. F. Ry. Co. Defendant's Original Motion for a new trial. Filed December 16, 1909. Jeff T. Kemp, County Clerk.

25 In County Court of Milam County, Texas, December 23rd, 1909.

No. 1744.

W. R. DENNIS
vs.
G., C. & S. F. RY. CO.

On this, the 23rd day of December A. D. 1909 came on to be considered the defendant's motion to set aside the verdict and judgment rendered herein against it on the 15th day of December A. D. 1909 and grant it a new trial of this cause, and the court having heard the motion read and argument of counsel is of the opinion that same ought to be in all things overruled.

It is therefore considered adjudged and decreed by the court that said motion be and is hereby in all things overruled to which ruling of the court, the defendant, in open court, then and there excepted and gave notice of appeal to the court of Civil Appeals of the Third Supreme Judicial District of Texas, at Austin, Texas. And it is further ordered by the court that defendant be granted twenty days, and all other time allowed by law, after adjournment of this court, in which to prepare, file and have approved its bills of exceptions, and to file its statement of facts and assignment of errors.

No. 1744. W. R. Dennis vs. G., C. & S. F. Ry. Co. Decree: Overruling defendant's motion for a new trial.

26 No. 1744.

W. R. DENNIS
vs.
G., C. & S. F. Ry. Co.

To Docketing	.10
" 4 files	.20
Iss. 3 subpœnas and 15 names	1.35
To app	.05
Swearing 16 witnesses	1.60
" jury & verdict	.50
Entering judgment	.50
" " Overruling motion	.50
15 affidavits	3.75
Taxing cost	.25
6 files	.30
Transcript fee	7.50
County Clerk's Cost	16.60
" Judge's "	3.00
J. P. No. 3	5.60
Constable Pre. No. 3	8.30
Witness fees	50.66
Sheriff Cost	11.10
Total cost	95.26

27 THE GULF, COLORADO & SANTA FE RAILWAY CO., Plaintiff in Error,
vs.
W. R. DENNIS, Defendant in Error.

Petition for Allowance of Writ of Error.

To the Honorable the Supreme Court of the United States:

Comes The Gulf, Colorado & Santa Fe Railway Company, by its attorneys J. W. Terry, Gardiner Lathrop, A. B. Browne and A. H. Culwell and complains that in the record and proceedings, as also in the rendition of a judgment in a suit between the Gulf, Colorado & Santa Fe Railway Company in the County Court of Milam County, Texas, being the highest court of law or equity in said State to which the said plaintiff in error could appeal and obtain a decision on the merits of the issues involved in said cause, and same being the court which has the final custody of the record in said cause, and that final judgment having been rendered against the said plaintiff in error by the said County Court of Milam County, Texas, on the 15th. day of December 1909, and in which plaintiff in error's motion for a new trial was over-ruled by said Court on the 23rd. day of December, 1909.

That in said cause there is drawn in question the validity of a statute of the State of Texas, same being known as Chapter 47, General Laws of the State of Texas, passed by the 31st. Legislature, and being "An act to regulate the presentation and collection of claims for personal services or for labor rendered, or for material furnished, or for over-charge in freight or express, or for any claim for lost or damaged freight, or for stock killed or injured by any person or corporation -gainst any person or corporation doing business in this State and providing a reasonable amount of attorney's fees to be recovered in cases where the amount of such claims shall not exceed $200.00, and declaring an emergency.

And the County Court of Milam County, Texas, having imposed and awarded judgment against plaintiff in error for the sum of $20.00 as an attorney's fee to the defendant in error, in addition to the amount awarded as the value of the animal killed, and which said judgment is now a final judgment, and from which there is no appeal to any other court or courts within the State of Texas;

That plaintiff in error plead in that court that the said act of the Legislature was unconstitutional and in contravention of Section 1, 14th. amendment to the Constitution of the United States,
28 which plea as presented in said County Court was by said Court overruled, and the said act of the Legislature declared constitutional. And you- petitioner here represents that said act of the Legislature denies to it the equal protection of laws, and deprives it of its property without due process of law, and that same is in contr-vention to said Section 1, 14th. amendment to the Constitution of the United States, and that there is here drawn in question the validity of a statute of, or an authority exercised under, said State of Texas, on the ground of their being repugnant to the constitution, treaties of laws of the United States, and the decision was in favor of such their validity, all of which appears in the records and proceedings in said suit; manifest error hath happened to the great damage of the Gulf, Colorado & Santa Fe Railway Company.

Wherefore the said The Gulf, Colorado & Santa Fe Railway Company, by its attorneys, prays an allowance of writ of error, and such other process as may cause the same to be corrected by the Supreme Court of the United States.

J. W. TERRY,
GARDINER LATHROP,
A. B. BROWNE, AND
A. H. CULWELL,
Attorneys for the Gulf, Colorado & Santa Fe Railway Company.

The Gulf, Colorado & Santa Fe Railway Company, Plaintiff in Error, vs. W. R. Dennis, Defendant in Error. Filed this the 20th. day of January A. D. 1910. Jeff T. Kemp, County Clerk, Milam County, Texas.

29 THE GULF, COLORADO & SANTA FE RAILWAY COMPANY,
Plaintiff in Error,
vs.
W. R. DENNIS, Defendant in Error.

Writ of Error Bond.

Know all men by these Presents: That we, The Gulf, Colorado & Santa Fe Railway Company, as principal, and Jno. Sealy and H. O. Stein as sureties, are held and firmly bound unto W. R. Dennis in the full and just sum of Five Hundred Dollars to be paid to the said W. R. Dennis, his certain attorney, executor, administrator or assigns, to which payment well and truly to be made we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents.

Sealed with our seals. Dated this 6th day of January, in the year of our Lord, One Thousand Nine Hundred and Ten.

Whereas, lately at a County Court of Milam County, Texas, in a suit pending in said Court between W. R. Dennis, plaintiff, and the Gulf, Colorado & Santa Fe Railway Company, defendant, a judgment was rendered against the said defendant, The Gulf, Colorado & Santa Fe Railway Company, and the said defendant, The Gulf, Colorado & Santa Fe Railway Company, having obtained a writ of error and filed a copy thereof in the Clerk's office of the said Court to reverse the judgment in the aforesaid suit, and the citation directed to the said W. R. Dennis citing and admonishing him to be and appear at a Supreme Court of the United States to be holden at Washington thirty days from the date hereof.

Now, the condition of the above obligation is such, that if the said defendant, The Gulf, Colorado & Santa Fe Railway Company, shall prosecute its writ of error to effect, and answer all damages and costs, if it fail to make its plea good, then the above obligation to be void, else to remain in full force and effect.

[SEAL.] THE GULF, COLORADO & SANTA FE RAILWAY CO.,
By TERRY, CAVIN & MILLS, *Solicitors.*
JOHN SEALY.
H. O. STEIN.

Attest:
A. C. TORBERT,
Secretary The Gulf, Colorado & Santa Fe Railway Co.

Approved by
EDWARD D. WHITE,
Associate Justice Supreme Court of the United States.

Writ to operate as a supersedeas.

30 I, Jno. Sealy, do solemnly swear that I am worth in my own right at least the sum of Five Thousand Dollars, after deducting from my property that which is exempt by the Constitution and laws of the State from forced sale, and after the payment of all my debts of every description, whether individual or security debts, and after satisfying all incumbrances on my property which are known to me; That I reside in Galveston County, State of Texas, and have property in said State liable to execution worth more than Five Thousand Dollars.

JOHN SEALY.

Sworn to and subscribed before me this 6th day of January 1910.

[SEAL.] CHAS. S. PECK,
Notary Public in and for Galveston County, Texas.

I, H. O. Stein, do solemnly swear that I am worth in my own right at least the sum of Five Thousand Dollars after deducting from my property that which is exempt by the constitution and laws of the State from forced sale, and after the payment of all my debts of every description, whether individual or security debts and after satisfying all incumbrances on my property which are known to me; that I reside in Galveston County, State of Texas, and have property in said State liable to execution worth more than Five Thousand Dollars.

H. O. STEIN.

Sworn to and subscribed before me this 6th day of January, 1910.

[SEAL.] CHAS. S. PECK,
Notary Public in and for Galveston County, Texas.

Filed this the 20th day of January, A. D. 1910. Jeff T. Kemp, County Clerk, Milam County, Texas.

31 In the County Court of Milam County, Texas.

THE GULF, COLORADO & SANTA FE RAILWAY COMPANY, Plaintiff in Error,
vs.
W. R. DENNIS, Defendant in Error.

In Error from the County Court of Milam County, Texas, to the Supreme Court of the United States.

Now comes the Gulf, Colorado and Santa Fe Railway Company, plaintiff in error, by its attorneys, J. W. Terry, Gardiner Lathrop, A. B. Browne, and A. H. Culwell, and says that in the records and proceedings aforesaid, there is manifest error in the judgment and decision of the County Court of Milam County, Texas, to-wit:

First. That County Court of Milam County erred in holding that the Railway Company was responsible to the plaintiff for an attor-

ney's fee in this Cause, and in holding that Chapter 47, General Laws of the State of Texas, passed by the 31st Legislature and being

"An act to regulate the presentation and correction of claims for personal services or for labor rendered, or for material furnished or for overcharge in freight or express, or for any claim to loss of damaged freight, or for stock killed or injured by any business or corporation against any business or corporation, doing business in this State, and providing a reasonable amount of attorney's fees to be recovered in cases, where the amount of such claims shall not exceed $200.00, and declaring an emergency."

was constitutional, and that the same was not in contravention of of Section One, 14th Amendment to the Constitution of the United States and did not deny to the defendant, equal protection of the laws, and did not deprive the defendant of its property without due process of law.

Second. The County Court of Milam County, erred in overruling and failing to grant the plaintiff in error, a new trial based upon the seventh ground of its motion therefor, which was submitted in said Court, and which was as follows:

"Because the Court erred in submitting to the jury, the following paragraph of its charge:

If your verdict for the plaintiff should be as much as for the sum of $75.00, you will allow an additional sum of $20.00 as attorney's fees. In case you should not find for plaintiff, damages as much as $75.00, you will not allow plaintiff any sum as attorney's fees; for the reason that same is on the weight of the evidence; for the reason that the same is violative of the 14th Amendment to the Constitution of the United States, in that it denies this defendant
32 the equal protection of the law there given and guaranteed; for the reason that the act of the Legislature, under authority, by which this charge was given, is class legislation, and does not give this defendant, the same right that is given to the plaintiff in the action; for the reason that under the Act of Legislature, the defendant is not permitted to recover an attorney's fee in case plaintiff's claim is defeated."

Third. The Act of the Texas Legislature, under which judgment for an attorney's fee was awarded to the plaintiff in the action, is and was *was* unconstitutional, and the same is in contravention of Section One, of the Fourteenth Amendment to the Constitution of the United States, and the same denies to the defendant in the action the equal protection of the laws guaranteed by said amendment to the Constitution; under the provisions of said Act of the Legislature, the defendant in the action is deprived of its property without due process of law, and the County Court of Milam County erred in not so holding.

Respectfully Submitted,

J. W. TERRY,
GARDINER LATHROP,
A. B. BROWNE AND
A. H. CULWELL,
Attorneys for Plaintiff in Error

Filed this the 20th day of January A. D. 1910. Jeff T. Kemp, County Clerk, Milam County, Texas.

33 THE GULF, COLORADO & SANTA FE RAILWAY CO., Plaintiff in Error,
vs.
W. R. DENNIS, Defendant in Error.

Writ of Error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable Judge of the County Court of Milam County, Texas, Greeting:

Because in the record and proceedings as also in the rendition of the judgment of a plea which is in the said County Court of Milam County, Texas, before you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between W. R. Dennis, plaintiff, and The Gulf, Colorado & Santa Fe Railway Company, defendant, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States, and the decision was against their validity, or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision was in favor of such their validity, or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty or statute of, or commission held under, the United States, and the decision was against the title, right, privilege or *examination*, specially set up or claimed under such clause of the said Constitution, treaty, statute or commission, *and* manifest error hath happened to the great damage of the said defendant, The Gulf, Colorado & Santa Fe Railway Company, as by its complaint appears, we being willing, that error, if any hath happened, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid with all things concerning the same to the Supreme Court of the United States, together with this writ, so that you have the same at Washington within thirty days from the date hereof in the said Supreme Court
34 to be then and there held that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 12th day of January, in the year of our Lord One Thousand Nine Hundred and Ten.

[Seal of the Supreme Court of the United States.]

JAMES H. McKENNEY,
Clerk Supreme Court of the United States.

To operate as a supersedeas on furnishing bond for Five hundred (500) Dollars.

EDWARD D. WHITE.

Allowed by:
EDWARD D. WHITE,
Associate Justice of the Supreme Court of the United States.

35 [Endorsed:] The Gulf, Colorado & Santa Fe Railway Company, Plaintiff in Error vs. W. R. Dennis, Defendant in Error. Writ of Error. Filed this the 20th day of January A. D. 1910. Jeff T. Kemp, County Clerk, Milam County, Texas. By —— ——, Deputy.

36 THE GULF, COLORADO & SANTA FE RAILWAY CO., Plaintiff in Error,
vs.
W. R. DENNIS, Defendant in Error.

The President of the United States to W. R. Dennis, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington within thirty days from the date hereof, pursuant to a writ of error filed in the Clerk's office of the County Court of Milam County, Texas, wherein The Gulf, Colorado & Santa Fe Railway Company is plaintiff in error, and you are defendant in error, to show cause, if any there be, why judgment rendered against the said plaintiff in error, as in the said writ of error, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Edward D. White, Associate Justice of the Supreme Court of the United States this the 12th day of January, in the year of our Lord One Thousand Nine Hundred and Ten.

EDWARD D. WHITE,
Associate Justice of the Supreme Court of the United States.

On this 20th day of January in the year of our Lord One Thousand Nine Hundred and Ten personally appeared J. E. Hattzclaw, Sheriff of Milam County, Texas, before me, a Notary Public in and for Milam County, Texas, and makes oath that he delivered a true copy of the within citation to U. S. Hearrell who is the attorney of record of the within nanted W. R. Dennis, defendant in error.

J. E. HATTZCLAW,
Sheriff of Milam County, Texas.

Sworn to and subscribed before me this — day of ——, A. D. 1910, by the said J. E. Hattzclaw, affiant.

[Seal Notary Public, Milam County, Texas.]

ED. F. ENGLISH,
J. P. and ex-Officio Notary Public in and for Milam County, Texas.

37 [Endorsed:] The Gulf, Colorado & Santa Fe Railway Company, Plaintiff in Error, vs. W. R. Dennis, Defendant in Error. Citation. Filed this the 20th day of January A. D. 1910. Jeff T. Kemp, County Clerk, Milam County, Tex. By —— ——, Deputy.

Fees:

For serving this citation	.75
Mil-age	.10
	.85

J. P. & Ex-off. Not. Public, 50 cts.

38 STATE OF TEXAS,
County of Milam:

I, Jeff T. Kemp, Clerk of the County Court of Milam County, Texas, do hereby certify that the foregoing 35 pages, contain a full, true, and correct transcript of the record, and of all papers filed and proceedings had together with the original writ of error and citation, respectively, in Cause No. 1744, W. R. Dennis vs. The Gulf, Colorado and Santa Fe Railway Company, as the same appear upon file and upon record in my office.

In Testimony Whereof, I have hereunto set my hand, with the seal of said Court, this 21st day of January, A. D., 1910.

[Seal County Court of Milam County, Texas.]

JEFF T. KEMP,
Clerk County Court Milam County, Texas.

39 [Endorsed:] No. 1744. Gulf, Colorado & Santa Fe Ry. Co., appellant, plaintiff in error, vs. W. R. Dennis, appellee, defendant in error. From the County Court of Milam County. Applied for by Chambers & Baskin, attorney for G. C. and S. F. Ry. Co., on the 17th day of January, 1910, and delivered to Chambers & Baskin on the 22nd day of January, 1910. Jeff T. Kemp, Clerk, Court, Milam County, Texas.

Endorsed on cover: File No. 22,005. Texas, Milam County, County Court. Term No. 429. The Gulf, Colorado & Santa Fe Railway Company, plaintiff in error, vs. W. R. Dennis. Filed February 4th, 1910. File No. 22,005.

MAR 5, 1912
JAMES H. McKENNEY,

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 203.

THE GULF, COLORADO AND SANTA FE RAILWAY COMPANY, PLAINTIFF IN ERROR,

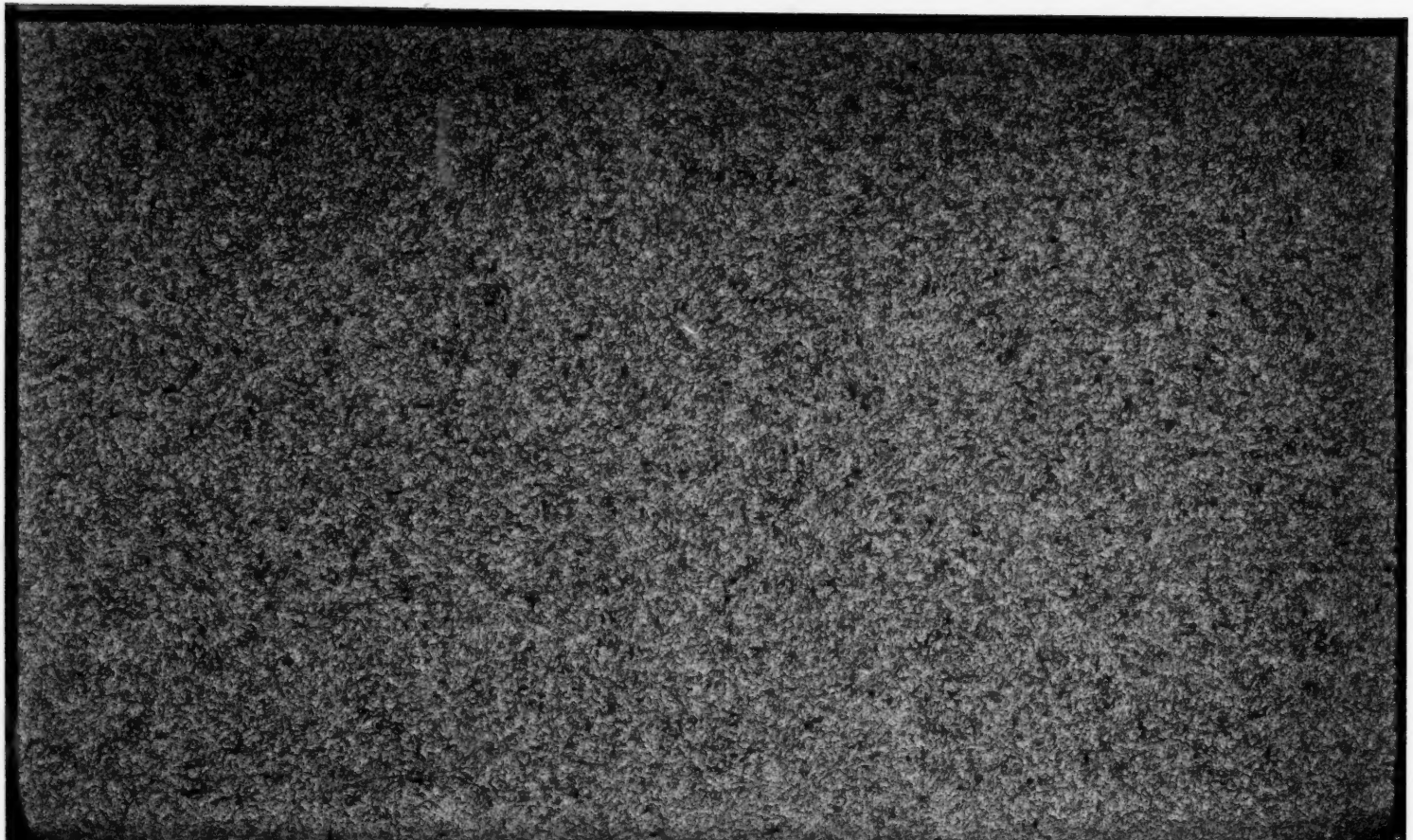
vs.

W. R. DENNIS.

IN ERROR TO THE COUNTY COURT OF MILAM COUNTY, STATE OF TEXAS.

BRIEF FOR PLAINTIFF IN ERROR.

J. W. TERRY,
GARDINER LATHROP,
A. B. BROWNE,
A. H. CULWELL,
ALEXANDER BRIGHAM,
EVANS BROWNE,
Counsel for Plaintiff in Error.



SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 203.

THE GULF, COLORADO AND SANTA FE RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

W. R. DENNIS.

IN ERROR TO THE COUNTY COURT OF MILAM COUNTY, STATE OF TEXAS.

BRIEF FOR PLAINTIFF IN ERROR.

This case originated in a justice's court of Milam county, Texas, where suit was brought against plaintiff in error for damages alleged to have been sustained, in amount $75.00, through the negligent killing of a cow by one of its trains (Rec., pp. 1-2). Judgment there was for the plaintiff below in the sum sued for, and also for a

further sum of $20.00 as attorney's fee (Rec., p. 2). Thereupon plaintiff in error appealed to the County Court of Milam County, Texas, pleadings were filed and issues raised, the case tried before a jury, and verdict returned for the plaintiff below (Rec., pp. 2 to 14). Judgment was thereafter entered for plaintiff below for damages in the sum of $75.00 and for an attorney's fee in the sum of $20.00, a total of $95.00, with costs (Rec., p. 14).

The Federal question was distinctly raised at the trial by a special exception of the defendant to that portion of plaintiff's pleadings wherein was sought recovery of attorney's fees, and a request of the court to strike out such part of the pleadings on the ground that the same was violative of the Fourteenth Amendment to the Constitution of the United States in that it denied defendant the equal protection of the law there given and guaranteed: that the act of the legislature of Texas under authority of which attorney's fee was claimed was class legislation, and did not give to defendant the same right as was given to the plaintiff in the action, and that under said act the defendant was not permitted to recover an attorney's fee in case plaintiff's claim was defeated. This is set forth fully in the bill of exceptions signed by the trial judge (Rec., p. 10). The Federal question is also raised by the assignments of error (Rec., pp. 20-21).

A motion for new trial was made by plaintiff in error, and denied (Rec., p. 14), and the judg-

ment of said county court of Milam county being final, this writ of error was sued out. The record was filed in the clerk's office of this court on February 4, 1910.

The judgment of the county court of Milam county was final, as that court was the highest court in the State to which the case could be taken.

Gulf, Colorado & Santa Fe Ry. vs. Helfley, 158 U. S., 98-100.

The question which is presented in this case has, since the case was docketed here, been practically decided by one of the Courts of Civil Appeals in Texas, and review of that court's decision on the question has been refused by the Supreme Court of that State, on application to it for writ of error therein. Inasmuch as a dismissal of the present writ of error would mean affirmance of the judgment below, plaintiff in error has deemed it proper to submit the case to this honorable court upon a brief explanation of the situation in which the case now stands.

That part of the judgment below awarding attorney's fees to the plaintiff was based upon an act of the Thirty-first Legislature of Texas (1909) which appears as chapter 47, page 93, of the official publication. That act and the title preceding it read:

> "An Act to regulate the presentation and collection of claims for personal services or for labor rendered, or for material

furnished, or for overcharge in freight or express, or for any claim for lost or damaged freight, or for stock killed or injured by any person or corporation, against any person or corporation doing business in this State, and providing a reasonable amount of attorney's fees to be recovered, in cases where the amount of such claims shall not exceed two hundred ($200) dollars, and declaring an emergency.

"Be it enacted by the legislature of the State of Texas:

"SECTION 1. That hereafter any person in this State, having a valid *bona fide* claim against any person or corporation doing business in this State, for personal services rendered or for labor done, or for material furnished or for overcharges on freight or express, or for any claim for lost or damaged freight, or for stock killed or injured by such person or corporation, its agents or employees, may present the same to such person or corporation, or to any duly authorized agent thereof, in any county where suit may be instituted for the same; and if, at the expiration of thirty days after the presentation of such claim, the same has not been paid or satisfied, he may immediately institute suit thereon in the proper court, and if he shall finally establish his claim, and obtain judgment for the full amount thereof, as presented for payment to such person or corporation in such court he shall be entitled to recover the amount of such claim and all costs of suit, and in addition thereto a reasonable amount as attorney's fees, provided, he has an attorney

employed in the case, not to exceed twenty ($20.00) dollars, to be determined by the court or jury trying the case; provided, however, that nothing in this act shall be construed to repeal or in any manner affect any provision of the law now in force giving a remedy to persons having claims of the character mentioned in this act, but the same shall be considered as cumulative of all other remedies given to such person or persons.

"SECTION 2. The fact that there is no law now in force in this State providing an effectual remedy for persons having such claims as are mentioned in this act, creates an emergency and an imperative public necessity requiring the suspension of the constitutional rule requiring bills to be read on three several days, and this act shall take effect from and after its passage, and it is so enacted."

The writ of error herein was sought on the ground that this statute was invalid as being in contravention of section one of the Fourteenth Amendment to the Federal Constitution, in that it *denied to the defendant* the equal protection of the law, and deprived the defendant of its property without due process of law.

This statute has, however, since this case was brought here, been held by the Texas Court of Civil Appeals to contravene the Constitution of the State of Texas, because it contained more than one subject of legislation.

Fort Worth and Denver City Ry. Co. vs. Loyd, 132 S. W. R., 899.

The opinion of the court in the case cited was rendered on November 19, 1910, some months after the present case was docketed here, and is printed in full in the appendix to this brief. While the point was raised therein that the statute was in violation of the Federal Constitution, the court, in view of its conclusion that it was void as in contravention of the State Constitution, refused to pass upon that question, and left it undecided.

Application was thereupon made to the Supreme Court of Texas, the highest court of that State, for writ of error, which was denied. A certified copy of the judgment of the court so refusing the application has been filed here and is also printed in the appendix. The refusal of that court, therefore, to grant the application for writ of error, made final and controlling the action of the Court of Civil Appeals holding the statute void, as in contravention of the State constitution.

Not only is the statute in the instant case void for conflict with the State constitution, but it is likewise void as contravening the Fourteenth Amendment of the Federal Constitution, in that it operates to deprive the railroad defendants of property without due process of law, and denies to them the equal protection of the law, since it singles them out of all citizens and corporations, and requires them to pay in certain cases attorney's fees to the party successfully suing them, while it gives to them no like or corresponding benefit. This was so held in the case of *Gulf, Colo-*

rado and Santa Fe Ry. Co. vs. Ellis, 165 U. S., 150, where was called in question the constitutionality of the act of the Texas legislature of April 5, 1889, which was in effect identical with the present statute and, to a large extent, similar in language. That the present statute is aimed, as was that act, at defendant common carriers is manifest.

It is submitted that the judgment below should be reversed.

Respectfully submitted,

J. W. TERRY,
GARDINER LATHROP,
A. B. BROWNE,
A. H. CULWELL,
ALEXANDER BRITTON,
EVANS BROWNE,
Counsel for Plaintiff in Error.

APPENDIX

FORT WORTH & D. C. RY. CO. *vs.* LOYD.*

(Court of Civil Appeals of Texas. Nov. 19, 1910. Rehearing Denied Dec. 10, 1910.)

1. Statutes (sec. 61**)—Title and Subjects of Acts—Construction:

Where an act contains a single provision which is broader than the title, the court may not narrow and change the ordinary meaning of the words employed in the act so as to sustain it as to cases falling within the title.

(ED. NOTE.—For other cases, see Statutes, Cent. Dig., sec. 196; Dec. Dig., sec. 61**.)

2. Statutes (secs. 64, 117**)—Title and Subjects of Acts—Partial Invalidity:

Acts 31st Leg., c. 47, entitled "An act to regulate the presentation and collection of claims or for personal services or for labor rendered, or for overcharges in freight, etc., against any person or corporation doing business in this State, and providing a reasonable amount of attorney's fees to be recovered, in cases where the amount of such claims shall not exceed $200," etc., and in section 1, permitting a recovery of attorney's fees in all suits on the same character of claims without re-

* Writ of error denied by Supreme Court.

** For other cases see same topic and section number in Dec. Dig. and Am. Dig. Key No. Series and Rep'r Indexes.

gard to the amount thereof, violates Const., art. 3, sec. 35, providing that no bill shall contain more than one subject, which shall be expressed in its title, etc., and since the act refers to all claims of the character therein specified collectively, and in the same language, it cannot be held valid as applicable to claims not in excess of $200, but is void in its entirety.

(Ed. Note.—For other cases, see Statutes, Cent. Dig., sec. 195; Dec. Dig., secs. 64, 117.**)

Appeal from Wise County Court; C. V. Terrell, judge.

Action by Coke Loyd against the Ft. Worth & Denver City Railway Company. Judgment for plaintiff, and defendant appeals. Reversed and rendered.

Spoonts, Thompson & Barwise, McMurray & Gettys, and J. M. Chambers, for appellant. R. E. Carswell, for appellee.

Dunklin, *J.*: Coke Loyd sued the Ft. Worth & Denver City Railway Company to recover $150 as damages to a shipment of cattle transported by the railway company from Decatur to Ft. Worth. By the judgment, from which the railway company has appealed, plaintiff was awarded $143.50 as damages and $20.00 additional as attorney's fees. Evidently the recovery for attorney's fees was predicated upon an act of the Thirty-first Legislature (1909), which appears as chapter 47, p. 93, of the official publication. That act and the title preceding read:

"An act to regulate the presentation and collection of claims for personal services or for labor rendered, or for material furnished, or for overcharges in freight or express, or for any claim for lost or damaged freight, or for stock killed or injured by any person or corporation, against any person or corporation doing business in this State, and providing a reasonable amount of attorney's fees to be recovered, in cases where the amount of such claims shall not exceed two hundred ($200) dollars and declaring an emergency.

"Be it enacted by the legislature of the State of Texas:

"SECTION 1. That hereafter any person in this State, having a valid *bona fide* claim against any person or corporation doing business in this State, for personal services rendered or for labor done, or for material furnished, or for overcharges on freight or express, or for any claim for lost or damaged freight, or for stock killed, or injured by such person or corporation, its agents or employees, may present the same to such person or corporation, or to any duly authorized agent thereof, in any county where suit may be instituted for the same; and if, at the expiration of thirty days after the presentation of such claim, the same has not been paid or satisfied, he may immediately institute suit thereon in the proper court, and if he shall finally establish his claim, and obtain judgment for the full amount thereof, as presented for payment to such person or corporation in such court he shall be entitled to recover the amount of such

claim and all costs of suit, and in addition thereto a reasonable amount as attorney's fees, provided he has an attorney employed in the case, not to exceed twenty ($20.00) dollars, to be determined by the court or jury trying the case; provided, however, that nothing in this act shall be construed to repeal or in any manner affect any provision of the law now in force giving a remedy to persons having claims of the character mentioned in this act, but the same shall be considered as cumulative of all other remedies given to such person or persons.

"SEC. 2. The fact that there is no law now in force in this State providing an effectual remedy for persons having such claims as are mentioned in this act creates an emergency and an imperative public necessity requiring the suspension of the constitutional rule requiring bills to be read on three several days and this act shall take effect from and after its passage and it is so enacted."

Appellant has assigned error to the award of attorney's fees upon the ground that the act quoted above was in violation of article 3, section 35, of our State Constitution of 1876, in that the title recites an act allowing the recovery of attorney's fees in suits upon claims of the character mentioned in the title when the amount of the claim asserted does not exceed $200, while in the body of the act a recovery of attorney's fees is permitted in all suits upon the same character of claims without regard to the amount thereof. Section 35, art. 3, of the Constitution, reads: "No bill (except general appropriation bills, which may embrace the various subjects and accounts for and

on account of which moneys are appropriated) shall contain more than one subject, which shall be expressed in its title. But if any subject shall be embraced in an act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be so expressed."

In Tax Collector *vs.* Finley, 88 Tex., 521; 32 S. W., 525, our Supreme Court in discussing the foregoing provision of the Constitution said: "It was doubtless intended by section 35 to prevent certain practices sometimes resorted to in legislative bodies to secure legislation contrary to the will of the majority: One, that of misleading members by incorporating in the body of the act some subject not named in the title; the other, that of including in the same bill two matters foreign to each other, for the purpose of procuring the support of such legislators as could be induced to vote for one provision merely for the purpose of securing the enactment of the other." Clearly, the body of the act embraces claims not included in the title. If the body of the act had been so framed that such claims could be rejected from its operation without changing or adding to the language of the act, then, in accordance with the constitutional provision quoted, the act would be held valid as applicable to claims not in excess of $200, and rejected when invoked in suits upon claims amounting to more than $200. But the act refers to all claims of the character therein specified collectively and in the same language, and to say that it shall apply only to claims not in excess of $200 would be to change or limit the ordinary meaning of the language employed. Such a construction is not permissible even under the liberal rule obtaining in the construction of statutes when assailed as being in contravention of the constitution.

In Sutherland on Statutory Construction, in section 87, the following is said: "The title cannot be enlarged by construction when too narrow to cover all the provisions in the enacting part, nor can the purview be contracted by construction to fit the title, but the title, if delusively general, may be sufficient though more extensive than the purview." The foregoing is in accord with the following statement of the law found in Am. & Eng. Encyc. Law, 596, which seems to be sustained by the authorities: "Where the act contains a single provision broader than the title, the court cannot narrow and change the ordinary meaning of the words employed in the act so as to sustain it as to cases falling within the title." See W. U. Tel. Co. *vs.* State, 62 Tex., 630; Cooley's Constitutional Limitations (6th ed.), 177, 211, 212; Elliott *vs.* State, 91 Ga., 694; 17 S. E., 1004; Trade-Mark Cases, 100 U. S., 82; 25 L. Ed., 550; Sutherland on Stat. Const., secs. 169, 170, 173, and decisions there cited.

In United States *vs.* Reese, 92 U. S., 214, 256; 23 L. Ed., 566, Waite, C. J., said: "We are therefore directly called upon to decide whether a penal statute enacted by Congress, with its limited powers, which is in general language broad enough to cover wrongful acts without as well as within the constitutional jurisdiction, can be limited by judicial construction so as to make it operate only on that which Congress may rightfully prohibit and punish. For this purpose we must take these sections of the statute as they are. We are not able to reject a part which is unconstitutional and retain the remainder because it is not possible to separate that which is unconstitutional, if there be any such, from that which is not. The proposed effect is not to be attained by striking out or disregarding words that are in the section, but by in-

serting those that are not there now. Each of the sections must stand as a whole or fall all together. The language is plain. There is no room for construction, unless it be as to the effect of the constitution. The question, then, to be determined is whether we can introduce words of limitation into a penal statute so as to make it specific, when, as expressed, it is general only. It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders and leave it to the courts to step inside and say who could be rightfully detained and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of the Government. The courts enforce the legislative will when ascertained, if within the constitutional grant of power * * *. To limit this statute in the manner now asked would be to make a new law, not to enforce an old one. That is no part of our duty."

In Sutherland on Statutory Construction, sec. 172, the author announces that the rule stated above is applied with greater stringency in construing criminal statutes. If that distinction obtains in this State, notwithstanding article 9 of the Texas Penal Code of 1895, which provides that our criminal statutes shall be construed according to the same rule as civil statutes, yet it is true, nevertheless, as shown by authorities cited above, that the rule applies to civil as well as criminal statutes, and the reasoning advanced in United States *vs.* Reese, *supra,* supports the rule in any event.

In reply to appellant's contention that the act is in contravention of the constitutional provision quoted above, appellee insists that the language of the title, "and providing a reasonable amount of attorney's fees to be recovered in cases where the amount of such claims shall not exceed two hun-

dred dollars," is but a statement of details or incidents to the subject of legislation not necessary to have been included in the caption, and which should be treated as surplusage, in no way limiting the subject of legislation. With this contention we cannot agree. Prior to the passage of the act the law permitted a recovery upon such claims as those mentioned in the act, and the only purpose of the act was to allow a recovery of attorney's fees whenever a suit should become necessary to collect a claim of the character mentioned. The provision in the title reciting, in effect, that the act authorized a recovery of attorney's fees upon claims only "where the amount of such claims shall not exceed two hundred dollars" clearly is not merely a statement of details or incidents to the subject. The provision is as much a designation of the subject of legislation as are the other provisions which refer to the character or kind of claims embraced in the act. For the reasons given above, we hold that the act discussed is void in its entirety, and this conclusion renders it unnecessary to discuss appellant's further contention that the act is also in violation of section 1 of the Fourteenth Amendment to the Constitution of the United States.

From the foregoing it follows that the judgment in favor of appellee for twenty dollars as attorney's fees must be reversed and judgment must be here rendered in favor of appellant upon the claim for such fees, and it is so ordered; but the judgment in appellee's favor for $143.50 and for costs of suit in the trial court is affirmed.

IN THE SUPREME COURT OF TEXAS.

January 4, 1911.

COKE LOYD
vs.
FORT WORTH & D. C. RY. CO.

From Wise County, Second District.

This day came on to be heard the application of Coke Loyd for a writ of error to the Court of Civil Appeals for the Second District, and the same having been duly considered, it is ordered that said application be refused. That the applicant, Coke Loyd, pay all costs incurred on this application.

I, F. T. Connerly, clerk of the Supreme Court of Texas, hereby certify that the above is a true and correct copy of the judgment rendered by the Supreme Court on the application for writ of error in the above-styled cause.

Witness my hand and the seal of said court this the 19th day of October, A. D. 1911.

[Seal Supreme Court of the State of Texas.]

F. T. CONNERLY, *Clerk.*

[Endorsed:] Application No. 7053. Coke Loyd *vs.* Ft. W. & D. C. Ry. Co. Copy of judgment in Supreme Court. Application for writ of error refused.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 203.

THE GULF, COLORADO AND SANTA FE RY. CO., PLAINTIFF IN ERROR,

vs.

W. R. DENNIS.

IN ERROR TO THE COUNTY COURT OF MILAM COUNTY, STATE OF TEXAS.

MEMORANDUM ON JURISDICTION.

ALDIS B. BROWNE,
Of Counsel.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 203.

THE GULF, COLORADO AND SANTA FE RY. CO., PLAINTIFF IN ERROR,

vs.

W. R. DENNIS.

IN ERROR TO THE COUNTY COURT OF MILAM COUNTY, STATE OF TEXAS.

MEMORANDUM ON JURISDICTION.

Judgment in justice court against plaintiff in error for $75 and $20 attorney fee. Appeal to county court where trial occurred and judgment for like amount entered (R., 14).

Sayles, Texas Civil Statutes, vol. 1, p. 996, title 27, courts, chapter 13:

"*Jurisdiction of the Court of Civil Appeals.*"

"Article 996. *Jurisdiction defined.*

"The appellate jurisdiction of the courts of "civil appeals shall extend to civil cases within "the limit of their respective districts—

"1. Of which the district courts have original "appellate jurisdiction.

"2. Of which the county court has original jurisdiction.

"3. Of which the county court has appellate "jurisdiction when the judgment amount in con- "troversy or the judgment rendered shall exceed "one hundred dollars, exclusive of interest and "costs. The judgment of the courts of civil ap- "peals shall be conclusive in all cases on the facts "of the case, and a judgment of such courts shall "be conclusive on the law and fact, nor shall a "writ of error be allowed thereto from the Su- "preme Court in the following cases, to wit:

"1. Any civil cases appealed from a county "court or from a district court when under the "constitution a county court would have had orig- "inal or appellate jurisdiction to try it, except in "probate matters and in cases involving the

" revenue laws of the State or the validity of a " statute.

" 2. All cases of boundary.

" 3. All cases of slander and divorce.

" 4. All cases of contested elections of every " character other than for State officers, except " where the validity of the statute is attacked by " the decision.

" 5. The judgments of said courts of civil ap- " peals shall be final in all appeals from interlocu- " tory orders appointing receivers or trustees or " in such other interlocutory appeals as may be " allowed by law and the judgment of said court " shall be final in all other cases as to law and facts " except where appellate jurisdiction is given to " the Supreme Court and not made final in said " courts of civil appeals" (Acts 1892, p. 25).

Rev. Stats. Texas, 1895, article 996.

Note at foot of page 996:

" 1. The court of civil appeals has jurisdiction " of cases appealed from a county court only when " the judgment appealed from exceeds $100, exclu- " sive of interest and costs, though the case origi- " nated in a justice's court and was not tried *de* " *novo* in the county court" (G. C. & S. F. Ry. Co. *vs.* Rowley, 22 S. W., 182).

* * * * * * *

" 4. The court does not have jurisdiction unless " the amount in controversy or the amount of the " judgment appealed from exceeds $100, exclusive " of interest and costs.

" H. & T. C. Ry. Co. *vs.* Pressley, 2 App. " C. C., sec. 504.

" I. & G. N. R. R. Co. *vs.* Matthews, 1 App. " C. C., sec. 510.

" Mimam *vs.* Eidmon, 1 App. C. C., sec. 629.

" T. & P. Ry. Co. *vs.* Haney, 2 App. C. C., " sec. 709.

" 3 App. C. C., sec. 233.

" The cases cited are based on the provisions of " former statutes of similar character."

" *Chapter* 3, *p.* 940:

" *Jurisdiction of the Supreme Court.*"

" Article 940. APPELLATE JURISDICTION OF SUPREME COURT.

" The Supreme Court shall have appellate juris- " diction co-extensive with the limits of the State, " which shall extend to questions of law arising in " all civil cases of which the courts of civil appeals " have appellate but not final jurisdiction" (Acts 1892, p. 19).

Supplement to Sayles' Texas Civil Statutes (1903) p. 124.

Note to Art. 996.

* * * * * * *

" 8. The appellate court has no jurisdiction of " a case appealed from the county court if the mat- " ter in controversy, exclusive of interest and costs " does not exceed $100.

" Ray *vs.* S. A. & A. P. Ry. Co., 18 C. A., " 665; 45 S. W., 479."

The same note adds on this point

Green *vs.* Warren, 18 C. A., 548; 45 S. W., 608.

Merriet *vs.* Rogers, 46 S. W., 370.

Allen *vs.* Hall, 60 S. W., 586.

G. C. & S. F. Ry. Co. *vs.* Cunnigan, 95.

T. R. 439, 67 S. W., 890.

Supplement 1908, *Art.* 996, *p.* 80; *note*:

" 1. When judgment was obtained in justice " court for less than $100 and on appeal to the " county court judgment for same amount was " rendered and appeal taken to court of civil ap- " peals, the appeal was dismissed for want of juris- " diction."

" Laey *vs.* O'Reilly, 89 S. W., 641."

Supplement 1910, *Art.* 940, *p.* 115; *note*:

" The Supreme Court has jurisdiction in cases " appealed from county court to court of civil ap- " peals involving the validity of statute, because

" article 996 declares that the jurisdiction of the " court of civil appeals is not final."

" Texas & Pacific Ry. Co. *vs.* Webb (S. C.), 114 S. W., 1173."

Hence the writ of error to the County Court of Milam County ran to "the highest court of a State in which a decision in the suit could be had."

ALDIS B. BROWNE,
Of Counsel.

GULF, COLORADO & SANTA FE RAILWAY CO. *v.* DENNIS.

ERROR TO THE COUNTY COURT OF MILAM COUNTY, STATE OF TEXAS.

No. 203. Submitted March 6, 1912.—Decided April 29, 1912.

The county court in Texas, being the highest court of the State to which the case could be carried, considering the amount involved, held that a railroad company was liable not only for the damages claimed, but also for an attorney's fee under Chapter 47, Laws of Texas, 1909. The railroad company sued out a writ of error from this court, having insisted in the state court that the statute violated the due process and equal protection clauses of the Federal Constitution. Before the case was reached in this court, the highest court of the State in another case adjudged the statute to be violative of a provision in the state constitution and void. That fact being brought to the attention of this court, *held* that:

The case not having been finally terminated, the right to the attorney's fee is still *sub judice*, and effect must be given by this court to the intervening decision of the highest state court and, as to dismiss the writ would leave the judgment to be enforced as rendered, the proper procedure is to vacate the judgment and remand the case to the county court so that it may give effect to the intervening decision of the highest state court.

In the exercise of its appellate jurisdiction over the courts of the several States, this court is not absolutely confined to the consideration and decision of the Federal questions, but may inquire whether, owing to any intervening event, such questions have ceased to be material, and dispose of the case in the light of that event.

THE facts are stated in the opinion.

Mr. J. W. Terry, Mr. Gardiner Lathrop, Mr. A. H. Culwell, Mr. A. B. Browne, Mr. Alexander Britton and *Mr. Evans Browne*, for plaintiff in error.

No appearance for defendant in error.

MR. JUSTICE VAN DEVANTER delivered the opinion of the court.

This was an action to recover damages from a railway company for the killing of a cow by one of its trains in Milam County, Texas. The case originated in a justice's court and was carried by appeal to the County Court, where the plaintiff obtained a judgment for $75 as damages and $20 as attorney's fee. The attorney's fee was awarded under a statute of the State (Laws of 1909, c. 47, p. 93) which the company insisted was repugnant to the due process of law and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States. The insistence was overruled and the company sued out this writ of error, the County Court being the highest court in the State to which the case could be carried, considering the amount involved.

Since the case was brought here the statute under which the attorney's fee was awarded has been adjudged invalid under the state constitution, by the highest court of the State, because the subject to which it relates is not sufficiently expressed in its title. *Ft. Worth & D. C. Ry. Co.* v. *Loyd*, 132 S. W. Rep. 899. Thus, the judgment of the County Court and the later decision of the highest court of the State are not in accord. The former proceeds upon the theory that the statute is valid under the state constitution, while the latter conclusively establishes that it is invalid. In these circumstances, what is the duty of this court respecting this matter of local law? Must we proceed upon the same theory as did the County Court, or must we give effect to the later decision of the highest court of the State? If we take the latter course and reverse the judgment for the attorney's fee, the question of the validity of the statute under the Fourteenth Amendment need not be considered; otherwise, it must be. The intervening decision does not in itself annul the judgment for the fee or prevent its enforcement, and so does not render the Federal question a moot one, unless it operates to place upon us the duty of reversing the judgment without regard to the merits of that question.

The case is still pending. The right to the attorney's fee is still *sub judice*. It depends entirely upon the statute, and the highest court of the State has pronounced the statute invalid under the state constitution. How, then, can we sustain the right or give effect to the statute? Should we not in this situation apply the settled rule, that the decision of the highest court of a State declaring a statute of the State valid or invalid under the state constitution must be accepted by this court? If this were a criminal case, wherein the accused had been convicted of a violation of a state statute, alleged to be repugnant to the Constitution of the United States, would we not give effect to an intervening decision of the highest court of the

State declaring the statute invalid under the state constitution? These questions may not be directly answered by the prior decisions of this court, but their right solution is more than suggested by the well-recognized rule of decision, that when, during the pendency in an appellate court of an action for a penalty, civil or criminal, the statute prescribing the penalty is repealed, without any saving clause, the appellate court must dispose of the case under the law in force when its decision is given, even although to do so requires the reversal of a judgment which was right when rendered. *United States* v. *Schooner Peggy*, 1 Cranch, 103, 110; *Yeaton* v. *United States*, 5 Cranch, 281; *Schooner Rachel* v. *United States*, 6 Cranch, 329; *Vance* v. *Rankin*, 194 Illinois, 625; *Hartung* v. *People*, 22 N. Y. 95; *Musgrove* v. *Vicksburg & Nashville R. R. Co.*, 50 Mississippi, 677; *Montague* v. *State*, 54 Maryland, 481; *Denver & R. G. Ry. Co.* v. *Crawford*, 11 Colorado, 598; *Sheppard* v. *State*, 1 Tex. App. 522; *Kenyon* v. *State*, 31 Tex. Cr. 13; Cooley's Const. Lim., 6th ed., 469; 2 Sutherland Stat. Con., 2d ed., § 286. In the first of the cases cited it was said by Chief Justice Marshall:

"It is in the general true that the province of an appellate court is only to inquire whether a judgment when rendered was erroneous or not. But if, subsequent to the judgment, and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied. . . . In such a case the court must decide according to existing laws, and if it be necessary to set aside a judgment, rightful when rendered, but which cannot be affirmed but in violation of law, the judgment must be set aside."

We think what was there said is, in principle, applicable here. For while on a writ of error to a state court our province ordinarily is only to inquire whether that court has erred in the decision of some Federal question, it does

not follow that where, pending the writ, a statute of the State or a decision of its highest judicial tribunal intervenes and puts an end to the right which the judgment sustains, we should ignore the changed situation and affirm or reverse the judgment with sole regard to the Federal question. On the contrary, we are of opinion that in such a case it becomes our duty to recognize the changed situation, and either to apply the intervening law or decision or to set aside the judgment and remand the case so that the state court may do so. To do this is not to review, in any proper sense of the term, the decision of that court upon a non-Federal question, but only to give effect to a matter arising since its judgment and bearing directly upon the right disposition of the case.

This view of the subject received practical recognition in the case of *Pacific Mail Steamship Co.* v. *Joliffe*, 2 Wall. 450. It was an action in a California court to recover half-pilotage fees allowed by a law of that State to a licensed port pilot whose services were tendered and declined. Objections of a Federal nature were interposed, but judgment was given for the plaintiff, and the case was then brought here. During its pendency in this court the legislature of the State passed a new statute, embodying the provisions of the prior law, with some modifications, and also in terms repealing it. The point was then made that the repealing clause terminated the right to recover and therefore that the action could no longer be maintained. And while the question whether the simultaneous reënactment and repeal of the prior law interrupted its continuity was a question of local law, it was fully considered, and the conclusion was reached that in practical operation and effect there was no repeal, but only a continuance of the prior law, with modifications not there material, thus leaving the right to recover and the Federal questions unaffected. The latter were then considered, and, being found untenable, the judgment was affirmed. In a dis-

senting opinion, having the approval of three members of the court, it was maintained that the new act abrogated the prior law, thereby putting an end to the right to recover, and that in consequence the judgment should be reversed, with a direction to dismiss the action. Thus, the entire court proceeded upon the theory that it was necessary to inquire whether the intervening statute put an end to the right to the fees in question, and, if so, to give effect to the statute accordingly.

Almost from the beginning it has been the settled rule in this court that when, pending a writ of error to a lower Federal court, and without the fault of the defendant in error, an event occurs which renders it impossible, if the case was decided in favor of the plaintiff in error, to grant him any effectual relief whatever, the court will not proceed to a formal judgment, but will dismiss the writ. And in *Kimball* v. *Kimball*, 174 U. S. 158, it became necessary to consider whether this rule was applicable to a case brought here on a writ of error to a state court. The question was resolved in the affirmative, and it was said (p. 162):

"From the necessity of the case, this court is compelled, as all other courts are, to allow facts which affect its right and its duty to proceed in the exercise of its appellate jurisdiction, but which do not appear upon the record before it, to be proved by extrinsic evidence. *Dakota County* v. *Gl[illegible]*, 113 U. S. 222, 225, 226; *Mills* v. *Green*, above cited [1[illegible] U. S. 651, 653]. The reasons are quite as strong, to say the least, for applying the rule to a writ of error to a state court, on which the jurisdiction of this court is limited to Federal questions only, as to a writ of error to a Circuit Court of the United States, on which the jurisdiction of this court extends to the whole case."

We conclude that in the exercise of our appellate jurisdiction over the courts of the several States we are not absolutely confined to the consideration and decision of the

Federal questions presented, but as a necessary incident of that jurisdiction are authorized to inquire whether by some intervening event those questions have ceased to be material to the right disposition of any particular case, and to dispose of it in the light of that event.

The present case is not one in which the writ should be dismissed, because that would leave the judgment to be enforced as rendered, which the intervening decision shows ought not to be done. Instead of being an obstacle to granting any effectual relief to the plaintiff in error, that decision constitutes in itself an all-sufficient ground for relieving it from the attorney's fee, independently of the Federal question presented on the record; and for the reasons before stated we think it becomes our duty to vacate the judgment so that the state court may apply the decision by awarding a new judgment in conformity therewith.

The judgment is accordingly reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

Reversed.

A. That represents the situation at one. (Witness refers to photograph)

229 Q. Who took that photograph?

A. I did.

Q. Does that correctly show at that point?

A. It does, sir.

By Mr. FALKNOR: We ask that this photograph be admitted in evidence and marked Exhibit —.

Q. Which of these roads there is the O. R. & N?

A. (Witness traces on the photograph the O. R. & N.)

Q. Which is the Northern Pacific?

A. (Witness traces on the photograph the Northern Pacific.) You can see right here the O. R. & N. track is sandwiched in.

Q. The O. R. & N. track is between the Northern Pacific tracks?

A. Yes, sir.

Q. And that represents the situation at the red circle one.

A. It does.

Q. That photograph you have represents the situation at circle two?

A. These two photographs.

Q. Did you take these photographs yourself?

A. I did, sir.

Q. They correctly represent the situation at those points?

A. They do, sir.

By Mr. FALKNOR: We ask that they be admitted in evidence and marked Exhibit —.

Q. Just make on the Photograph that you have marked in circle two the Northern Pacific road and the O. R. & N. road.

(Witness marks O. R. & N. on the O. R. & N. road and Northern Pacific on the Northern Pacific road.)

Q. Did you measure the distance at that point between the O. R. & N. road and the Northern Pacific track?

A. I did.

230 Q. How far is the O. R. & N. track at that point from the Northern Pacific?

A. That is the center—18 feet and six inches.

Q. Was there any connection there of the road that heretofore didn't connect at that point?

A. No, sir, they had a transfer track but no connection.

Q. At Connell, did you find any connection at any place where the two roads had been connected?

A. They might have been. It is impossible to say. The tracks are only a few feet apart.

Q. Did you estimate the cost of making connection at either of these points?

A. At the point marked one it is simply a matter of shifting the track.

Q. What would be the expenses incident to that?

A. The expenses would be merely the time of the section foreman and his men.

Q. About how much time would that take?

A. A section gang of white men could do it in a day; Italians probably two days.

Q. How many men do you include in a gang?

A. The gang that was there was probably eight or ten men.

Q. That is from your personal observation?

A. Yes, sir.

Q. What would be the cost incident at the connection at two?

A. There would be some drilling at that point, Mr. Falknor, but just how much I am unable to say at present. My notes will give the necessary number of feet.

Q. But you can't give the estimate at this time?

A. No, sir.

By the CHAIRMAN:

Q. How much material would it take to connect the track?

A. No material at all. There is only 12 ft. 4 in. between. They would shift 6 ft. two one way, the other six feet two the other. The two tracks overlap.

By Mr. GROSSCUP:

Q. Would you have to have a switch?

A. No, sir, the tracks overlap.

Q. How would you transfer the freight from one track to the other?

A. Simply right along there. It would become one track then.

By Mr. FALKNOR:

Q. Now, what was the next town that you visited Mr. Church?

A. Waverly was the next town, Mr. Falknor.

Q. Have you any drawing of the situation of the tracks at Waverly?

A. I have.

Q. Will you identify it? What roads converge at Waverly?

A. The O. R. & N. and the Spokane & Inland. Both terminate at that point.

Q. The Northern Pacific don't go to Waverly?

A. No, sir.

Q. Just the O. R. & N. and Spokane & Inland?

A. Yes, sir.

Q. This identification heretofore marked blank and upon which you have written "Waverly," does it correctly represent the situation at that point so far as the location of the roads are concerned?

A. It does.

Q. What color on this map represents the O. R. & N.

A. Both are in black; the O. R. & N. and Spokane & Inland are both in black; possible connection tracks are in orange.

Q. The lettering on the identification would show what road is referred to?

A. Yes sir.

Q. Who made this diagram?

A. I did, sir.

232 Q. And then verified it from the actual condition on the ground?

A. Yes, sir.

Q. Recently, as you testified to?

A. Yes, sir.

By Mr. FALKNOR: For the purpose of illustrating and explaining the testimony of Mr. Church, we ask that this plat designated as Waverly be admitted as an Exhibit —.

Q. Did you take any photographs at that time showing the situation at that point?

A. I did.

Q. Will you identify those photographs?

A. I will, sir. (Witness marks four on the photograph in the red circle and four on the plat in the red circle.)

Q. Who took those photographs?

A. I did, sir.

Q. Does it correctly represent the situation at that place?

A. It does, sir.

Q. What does the writing on that photograph indicate?

A. It indicates the various buildings and tracks.

Q. What do you mean in this photograph by the writing "three rail O. R. & N?"

A. Three rails, one of which is used jointly for cars coming in on either of the tracks.

Q. Is that the situation at that point?

A. It is, sir.

Q. The O. R. & N. has three rails, the inside rail is used for cars?

A. Yes, sir, for whichever track they may come in on.

Q. Now you have letters on this photograph marked four "S. & I." That is the Spokane & Inland?

A. Yes, sir.

233 Q. How far is the Spokane & Inland from the O. R. & N. at the point shown in the photograph marked four?

A. The distance is forty-four feet—thirty-three feet and some inches.

Q. Are there any physical engineering difficulties in making a connection at that point?

A. No, sir; there is a building there which is now being removed.

Q. What is that building?

A. It is an old brick building formerly used for the measuring and weighing of beets when they were brought in by wagon.

Q. What is the approximate size of the building?

A. I should say it was about twenty by thirty feet as I remember it.

Q. Is it now used for any purpose?

A. No, sir.

Q. Abandoned?

A. Yes, sir.

Q. And is already being torn down and removed?
A. Yes, sir.
Q. Would it require the acquisition of any land at that point to make connections between the Spokane & Inland and the O. R. & N.?
A. No, sir. This land is used by the Corbin Sugar Beet Factory and they are desirous of having a connection made.
Q. Did you take photographs of that place?
A. Not at that point.
Q. Does the photograph marked four indicate the most feasible connection between these two roads at Waverly.
A. It indicates possible locations. There are three possible locations.
Q. Where are the other places?
A. It is possible to locate there——
Q. Indicate.
234 A. (Witness refers to plat.) At point A on the plat, at the point shown by the figure 4, and at the point C.
Q. Now what would be the cost incident to connection at 4?
A. The laying of the track.
Q. From where?
A. Well, the material and the grading.
Q. About what quantity of work or amount of work would have to be made for a connection at 4?
A. Well that would depend on the length of the track.
Q. Could you give us, at this time, any approximate idea as to the amount of work incident to a connection at 4?
A. Why I think it would be about a dollar and some cents per lineal foot of track and a connection would cost a hundred and some dollars for the switch.
Q. Ordinarily what would be the outside figure necessary to the cost of a connection at figure 4, if you can give it?
A. That would be about seven hundred feet—it would cost approximately $1.60 per lineal foot for track and approximately $148 for the switch.
Q. About how many feet of track would have to be put in at 4?
A. About seven or eight hundred feet.

By the CHAIRMAN:

Q. Forty feet between, is it?
A. Yes.
Q. Does that include both labor and material?
A. That includes both labor and material.

By Mr. FALKNOR: We ask that photograph marked four in the red circle be admitted in evidence and marked Exhibit —.

Q. What would be the cost of construction at the points marked A and B?
A. Point A would require a trestle and fill and the same would apply to certain parts of the location marked B.

235 Q. Could you give us some idea of the cost of that trestle and fill at A?

A. Not until I could get the estimate of it, Mr. Falknor. I could give it to you in about an hour.

By the CHAIRMAN: You make up the approximation and file it here.

By Mr. FALKNOR:

Q. Would there have to be any land acquired at A and B?

A. I am under the impression that that land is all owned by the Corbins.

Q. Well, now, what was the next point that you visited?

A. Rosalia.

Q. Have you got your diagram of that?

A. Yes.

Q. Have you the one you made from this?

A. No, I haven't.

Q. (Calling the witness's attention to the identification or blue print marked Spokane & Inland R. R. map of Rosalia.) Did you visit Rosalia recently?

A. I did, sir.

Q. Do the railroads as shown on this plat correctly show their relation, one to the other, as determined by you from a personal inspection?

A. They do.

Q. What roads come through this place?

A. The Spokane & Inland, Empire and the Northern Pacific.

By Mr. FALKNOR: We ask that this blue print be admitted in evidence for the purpose of explaining the testimony of witness, and marked Exhibit —.

Q. Which is the Northern Pacific line as shown on this
236 blue print?

A. The Northern Pacific as shown on this blue print is the line along here——

Q. Along Pine St.?

A. Yes.

Q. Where is the Spokane & Inland.

A. The Spokane & Inland runs along Pine St. and the Northern Pacific—the name of the street isn't given, but it runs eastward of it.

Q. From how far?

A. I took the distance and found it to be three hundred and fifty-two feet.

Q. At the closest point?

A. At the closest point.

Q. Did you make any investigation with a view to determining at what point a connection between these two roads could most conveniently be made?

A. I did.

Q. At what points?

A. Well, on the rectangular between two—between the lines AA and BB, as marked on the plat.

Q. How would you make that connection? How far is the Spokane & Inland from the Northern Pacific ground?

A. As shown on this blue print it is approximately forty feet.

Q. What is the condition of the country between these two roads at the point you have testified?

A. The condition of the country between those two points I have testified to is shown by the accompanying photographs.

Q. Did you take these photographs?

A. Yes, sir.

Q. Do they correctly represent the country at the points you have testified to between the line AA and BB?

A. Yes, sir.

237 Q. Can you take any one of these five photographs and indicate about the situation of the Northern Pacific and about the situation of the Spokane & Inland in the photograph?

A. I can, sir.

Q. Do that, will you, at these points?

A. Point six, the Northern Pacific road shows at the left of the photograph and the Spokane & Inland at the right. That is the Spokane & Inland over there and that is the Northern Pacific track with the car standing on it.

Q. There is a man standing in the picture holding up a paper. Does he stand in the space between AA and BB?

A. He does, sir.

Q. And is the country from the Northern Pacific to the Spokane & Inland as indicated in this picture entirely disused?

A. Yes, with the exception of the section foreman's house.

Q. How with regard to being level or otherwise?

A. It is level. There is one ditch I have shown here.

Q. Will you please indicate on the other photographs the situation of the two roads? Which road is nine?

A. The first one, that is showing the position that I stood.

Q. Nine on the photograph corresponds with nine on the blue print?

A. Yes, sir, and the arrow on the blue print corresponds with the direction the camera was pointed when I took the picture.

By Mr. FALKNOR: We offer in evidence these photographs as illustrating further the testimony of witness, and ask that they be marked Exhibits — —.

Q. Did you make any estimates there, Mr. Church, incident to making a connection at that point?

A. I have not, as yet. I haven't made the tracing yet.

Q. We would like an estimate of the cost incident to the making of a connection at those two points. Is there any engineering

238 difficulties in making that connection?

A. No, sir.

Q. Now, the next place?

A. The next place was at Thornton.

Q. Have you a diagram or map of the situation at Thornton?
A. Yes, sir.
Q. What roads come into that town?
A. The O. R. & N., Spokane & Inland Empire.
Q. (Calling the witness' attention to the map marked Thornton) Does the relation of the roads as shown on that map correctly show the situation on the ground?
A. It does.

By Mr. FALKNOR: We ask that this be marked as Exhibit — and we offer it in evidence as illustrating the testimony of this witness.

Q. The O. R. & N. lines apparently cross the Spokane & Inland at this point?
A. Tney do, sir.
Q. Are both the roads actually constructed at that point?
A. They are.
Q. They cross at grade?
A. Yes, sir.
Q. Similar gauge?
A. Yes, sir.
Q. Is there any way by which the cars can be transferred from one road to the other at the present time?
A. Not at the present time.
Q. Did you take any photographs of the situation at that point?
A. I did.
Q. Will you identify this photograph?
A. I will. (Witness marks photograph ten and ten in a circle.)
Q. Why do you mark ten on the plat and ten in the circle?
239 A. The circle on the plat with its accompanying arrow indicates the point at which I stood when the photographs were taken and also the way the camera was pointed.
Q. The arrow?
A. Yes, sir.
Q. Now, indicate the other in a similar way, marking on both the plat and photograph. Are there any physical difficulties at that point preventing the connection between these roads so that cars can be transferred from one to the other?
A. No, sir.

By Mr. FALKNOR: We offer these photographs marked ten, eleven and twelve, in connection with the plat, and ask that they be marked Exhibit —.

Q. Did you make any estimate of the cost of connection at that point?
A. That would depend upon the length of track.
Q. Explain that.
A. It depends on the distance or length that the switches are to be and the length of the track. It depends on conditions which would be at the option of the engineers.

By the CHAIRMAN:

Q. Well, what would be a pretty good connection?
A. I think three hundred feet.
Q. At how much per foot?
A. A dollar sixty.
Q. And the labor?
A. That is included and it would cost approximately $148 for each of the two switches.

By Mr. FALKNOR:

Q. There would be no necessity of acquiring any additional land there, would there?

A. The location might possibly run out of their right of
240 way. I don't know exactly where their right of way extends.

Q. Now, take the next point. It might be well for you, Mr. Church, to make a statement covering the probable reasonable cost of making connections at all of these points.
A. The next point is Oakesdale.
Q. What roads come into that town?
A. The Northern Pacific, O. R. & N. and Spokane & Inland.
Q. Have you anything more than a blue print of that place?
A. No, sir.
Q. Does the blue print which you are submitting and identifying at this time correctly show the situation of these roads at Oakesdale?
A. It does, sir.
Q. How far apart are these roads at that point?
A. A spur of the O. R. & N. comes within eighty-five feet of the side of the Northern Pacific, and the main track of the Northern Pacific and the Spokane & Inland Empire lie within a hundred and sixty-five feet of one another.
Q. Did you investigate with a view to finding the most fallible? (feasible) point of connection?
A. I did, and took photographs showing that location.
Q. At what point?
A. My first picture was taken at the point marked 13 on the blue print.
Q. Do you intend thirteen as a fallible place of making connection between the three roads?
A. Yes, sir, a fallible place between the spur of the O. R. & N. and the Northern Pacific.

By Mr. GROSSCUP:

Q. Where would the connection be with the Spokane and Inland?
A. That would be over the ground shown by photograph fourteen and fifteen.

241 By Mr. FALKNOR: The witness has marked photographs 13, 14, 15 and 16.

Q. Now, they correspond with the circles and letters on the blue print?

A. They do, sir.

Q. Now, I want you to repeat again at what point would it be most convenient to make connection between these three roads at that place?

A. Over the ground indicated by the photographs.

Q. Which photographs.

A. Those just submitted.

Q. 13, 14, 15 and 16.

A. Yes.

Q. And they correspond to the place similarly marked on the blue print?

A. They do.

Q. Now intervening obstacles, if any, exist at that point?

A. There are none. There are no buildings in the way at all.

Q. Will you draw a line indicating where this connection would be made so as to show that it doesn't interfere with any buildings?

A. Right here.

A. I will mark AA, that connects the O. R. & N. and the Northern Pacific.

Q. Now connect up these two roads with the Spokane & Inland?

A. At the point marked BB.

Q. That connects what roads?

A. All three.

Q. By continuing AA to BB, to the line marked in pencil Spokane & Inland, you make connections with all three roads?

A. Yes, sir.

Q. Between AA and BB on the projected line there are no buildings?

A. No, sir.

Q. What is the character of the country?

A. The country is approximately level,—Well, there is a ditch in there that is about five feet below the level of the North-

242 ern Pacific track.

Q. What about the grades?

A. The O. R. & N. is one foot lower than the Northern Pacific, as determined by hand level.

Q. How about the Spokane & Inland?

A. Those are level.

Q. Would the fact that the O. R. & N. is one foot below the level of the Northern Pacific be any engineering difficulty to make connection at that point?

A. None whatever.

Q. You can't give the approximate cost of making a connection?

A. Not at this time.

Q. You will furnish that later?

A. I will furnish that later.

By Mr. FALKNOR: We offer these identifications in evidence and ask that they be marked Exhibit —.

Q. Now, take the next place, Mr. Church?

A. The next place is Farmington.
Q. Have you a plat showing Farmington?
A. Yes, sir.
Q. What roads converge at that point?
A. The Northern Pacific and the O. R. & N. The Northern Pacific ends at that point.
Q. The plat you prepared correctly shows the situation of those two roads at that point?
A. It does, sir.

By Mr. FALKNOR: We ask that this plat marked "Farmington" be admitted in evidence as illustrating the testimony of this witness and ask that it be marked Exhibit —.

Q. The Northern Pacific runs at what place on that map?
243 A. The points are indicated.
Q. Of the O. R. & N., where?
A. Right here.
Q. How far apart?
A. 171 ft. and 4 inches.
Q. Did you make any investigation at that point to see where any probable connections could be made?
A. I did. I took the distance between the tracks and I estimated the elevation with a hand level and noted that there were no buildings in the way.
Q. Did you mark on the map where that connection could be made?
A. Yes, sir. It is marked in orange.
Q. How far is the terminal of that line?
A. Six hundred feet.
Q. Did you photograph the situation at this point?
A. No, sir.
Q. What is the condition of the country between the lines?
A. Level and no buildings intervening.
Q. What are these lines here? (Counsel refers to plat.)
A. Those are two warehouses that I noticed on the ground and of which no mention was made in the Northern Pacific station plat furnished by the road.
Q. In making the connection that you have indicated, would there be any necessity of acquiring any other land?
A. No, sir, the station plat shows the O. R. & N. property as existing to that line, the boundary of Railroad avenue.
Q. Who owns the land south of that?
A. I can't say.
Q. The Northern Pacific?
A. Why, I imagine the Northern Pacific; they have got their station on it.
Q. That is a street?
244 A. Yes, sir.
Q. Now you can't give us at this time anything as to the cost?
A. It would be a dollar and sixty cents per lineal foot connecting tracks and the placing of two switches at $148 each.

Q. A thousand dollars would cover it all?
A. Yes, sir.
Q. It might be well for you to check up all your estimates o all of them, when you make your statement.
A. Yes.
Q. What is your next point?
A. Garfield.
Q. (Calling the witness' attention to blue print marked "Ga field.") I will ask you if you checked up the situation of the roa on the ground?
A. I did.
Q. Do they correspond accurately on the ground as to their re lation to each other as shown on the blue print?
A. They do, sir.

By Mr. FALKNOR: We ask, that this blue print be admitted i evidence to illustrate the testimony of the witness, and marked Ex hibit —.

Q. Now how close do the roads approach each other at Garfield?
A. At grade crossing.
Q. At what point on the blue print do they cross? Will yo mark that?
A. The O. R. & N. and the Northern Pacific cross at the poi marked A; the O. R. & N. and the Spokane and Inland cross a point marked B.
Q. Now, the Northern Pacific and the O. R. & N. Cross at grade
A. They do.
Q. Is the Spokane and Inland the same grade?
A. It is.
245 Q. Did you take any photographs of the situation there?
A. No, I didn't.
Q. Did you make any investigation as to a probable place wher a connection could be made between all three of the roads?
A. The O. R. & N. already connects with the Northern Pacific.
A. At what point
A. The connecting track is shown on the blue print. It will b necessary to connect the O. R. & N. and the Spokane & Inland and Spokane & Inland and the Northern Pacific.
Q. Where could such connection be conveniently made?
A. The O. R. & N. and Spokane & Inland could be conveniently connected at any point between the lines marked CC and DD.
Q. Would there be any necessity between those two points o acquiring land other than what is owned by the railroads now?
A. I understand their right of ways abutt.
Q. So that there would be no necessity of their acquiring othe lands?
A. To the best of my knowledge there would not.
Q. What is the character of the country at that place?
A. There is a creek running between the two banks at that poin which would necessitate a trestle.
Q. They are at grade?
A. Yes, sir.

By Mr. FALKNOR: We offer these in evidence and ask that they be marked Exhibit —.

Q. Between what roads did you indicate the connection CC and DD?

A. The O. R. & N. and Spokane and Inland.

Q. Now the Spokane & Inland and the Northern Pacific, where could that connection be conveniently made?

A. Betwen the points DD and EE.

Q. Do their rights of way abutt between those points?

246 A. There is a grade crossing between those points.

Q. Would there be any necessity of acquiring additional land?

A. I think there would in order to give an easy curve to the connecting track.

Q. You couldn't indicate to about what extent, could you?

A. I can when I come to make up my regular tracing.

Q. When you come to make your regular tracing you can show the probable amount of land that would have to be acquired?

A. Yes, sir.

Q. Will you do that?

A. Yes, sir.

Q. At the points indicated?

A. Yes, sir.

Q. Would there be any engineering difficulties in making that connection?

A. No, sir.

Q. Now the next point?

A. That is Palouse.

Q. Is that the last one?

A. No, sir.

Q. Have you a plat?

A. I have a station plat of Palouse furnished by the Spokane & Inland Empire R. R. Co.

Q. Does this plat correctly show the relation of the roads as determined in the investigation on the ground?

A. It does.

Q. What roads go into Palouse?

A. The Northern Pacific, Spokane & Inland Empire and Washington, Idaho and Montana.

Q. Now, how close are the roads situated to each other?

A. The Spokane & Inland—the tracks of the Northern Pacific and Washington, Idaho and Montana abutt and connect.

247 Q. Well the Northern Pacific and the Spokane & Inland?

A. The Spokane & Inland and the Northern Pacific connect from one to the other over about two hundred feet of intervening track of the W. I. & M.

Q. Do I understand that the Northern Pacific and Spokane & Inland transfer their cars from one road to the other?

A. It is physically possible to do so, by using a piece of track of the Washington, Idaho and Montana.

Q. Well, if you couldn't use that there would be no other physic connection between the roads?
A. No, sir.
Q. Did you investigate to see where probable connection coul be made at this point?
A. I did.
Q. Indicate on this plat where that is.
A. Between the points AA and BB.
Q. Marked on the blue print?
A. Yes, sir.
The track of the Spokane & Inland is not laid at that point yet, but it is easy to see from looking at the ground where the trac is going to go.
Q. Would their rights of way be contiguous at that point?
A. From the plat shown me they abutt.
Q. Did you take any photographs of that?
A. No, sir.
Q. Now, you can furnish us with an estimate of the probable co of -*ka*ing the connection at that point?
A. I can.
Q. What is the character of the country—level or otherwise?
A. It is level between the two tracks.
Q. Are there any intervening buildings?
A. No, sir.

By Mr. FALKNOR: We ask that this be admitted in ev
248 dence and marked Exhibit —.

Q. What is the next town?
A. The next town is Pullman.
Q. (Showing witness diagram marked "Pullman.") I will as you what roads converge at that place?
A. The Northern Pacific and the O. R. & N.
Q. They are indicated on this blue print?
A. Yes, sir.
Q. Are there relations as shown on this plat there correct determined from the investigation on the ground?
A. It is, sir.

By Mr. GROSSCUP: What is the use of taking up Pullman? Ther is a connection there. There is a joint warehouse there.
By Mr. FALKNOR: Well, we will waive that for the time being.

Q. What is the next town?
A. The next town is Colfax.
Q. What roads converge at Colfax?
A. The Spokane & Inland and the O. R & N.
Q. Did you make this plat?
A. I did.
Q. Does it correctly illustrate the connection of the two road at that point?
A. It does.

By Mr. FALKNOR: We will ask that this be admitted in evidenc and marked Exhibit —.

Q. Now, both lines are constructed at that place? Both lines are in operation?

A. No, sir; the O. R. & N. is in operation.

Q. What is the condition of the other line?

249 A. Has done considerable of its grading but the track is not laid.

Q. That could be determined?

A. Yes.

Q. How close do they approach to the O. R. & N.?

A. They come within fifty feet of one another with no intervening buildings.

Q. Have you illustrated on this plat any possible place where a connection could be made?

A. I have.

Q. It that indicated in orange?

A. It is, sir.

Q. At that point their present rights of way come how close to each other?

A. They abut, and it is evident that the tracks of the Spokane & Inland will approach within about fifty feet of the tracks of the O. R. & N.

Q. What is the condition of the country?

A. It is level.

Q. Any intervening buildings?

A. No sir.

By Mr. FALKNOR: I think that is all except we will call Mr. Church later on to give estimates as to the probable cost of making connections between the roads at the various points indicated by him, with a view of advising the Commission as to the probable expense the roads would be put to in selecting that or some other place for making connections.

Cross-examination.

By Mr. GROSSCUP:

Q. At Rosalia, Mr. Church, there is no intersection of the lines of the Spokane & Inland and the Northern Pacific?

A. No, sir.

250 Q. They are simply parallel to each other?

A. Yes, sir.

Q. The- parallel each other from Oakesdale to what point?

A. How do you mean?

Q. The- run parallel, practically parallel, from Oakesdale to what point?

A. I don't know how far they run parallel.

Q. You haven't examined into that?

A. No. I know they are parallel at that point.

Q. And about 350 feet apart?

A. Yes, I think so. I have got it down on the blue print.

Q. You are not aware of the character of the ownership of the land over which any connection would have to cross?

A. No sir.

Q. Now, at Oakesdale, the connection which you propose inter changes and crosses the main line of the Northern Pacific, does i not?

A. The connection which I said was possible between the O. R. & N. and Spokane & Inland would at that point cross the main line o the Northern Pacific.

Q. In other words, it would make a switching track across the main line of the Northern Pacific.

A. The track at that point crosses the main line of the Northern Pacific.

By the CHAIRMAN:

Q. It would be a continuation of a switch between the O. R. & N and the Northern Pacific?

A. It would.

By Mr. GROSSCUP:

Q. That is, if the switch was introduced at that place? It
251 is not the continuation of any existing switch?

A. No, sir.

Q. So, with a connection at that place, it would introduce a hazardous element to the main line of the Northern Pacific?

A. The tracks would cross the main track of the Northern Pacific at that point. Regarding the element of hazard, I don't know.

Q. Now, at Farmington, it is the end of a branch of the Northern Pacific?

A. To the best of my knowledge and belief it is.

Q. And the end of a branch of the O. R. & N.?

A. I don't know whether they end there or not.

Q. Well, it is on a branch of the O. R. & N.?

A. Yes, sir, it is.

Q. You are not posted as to whether there is any requirement of any connection at that point for any reason at all?

A. I am simply testifying as to the possibility of making a connection.

Q. Farmington is simply a sub-end of a branch of the Northern Pacific and the sub-end of a branch of the O. R. & N.?

A. Well, I think so.

Q. Now, Palouse, the situation at Palouse requires the acquisition of some private property, you say?

A. I am under the impression that the right of way of the lines will abut at Palouse. I think there is no intervening private property, although I can't state as to that. As to the right of way of the Spokane & Inland Empire, I don't think that is fenced off at the present time.

Q. As to the O. R. & N. and Northern Pacific at Palouse; do they cross each other?

A. I don't think the O. R. & N. enters Palouse.

Q. No, that is so. And the Spokane & Inland is not built there yet?

252 A. It enters the town but doesn't go through it to the south.

Q. No operation on it yet of any kind?

A. Trains are brought into Palouse over its tracks I understand, but not through Palouse and points between.

By Mr. SPENCER:

Q. Mr. Church, coming onto Thornton on the Spokane & Inland you come down a pretty bad grade, don't you? About a two per cent grade as you approach Thornton?

A. I don't think so.

Q. Don't you know that going out of Thornton on the Spokane & Inland for a distance of about eleven to thirteen hundred feet there is a very substantial grade, approximately two per cent?

A. At the crossings the grades seem to be very slight indeed.

Q. Well, bother coming in and going out of Thornton you have to drop down quite a bit, don't you, on the Spokane and Inland?

A. I don't think so.

Q. Did you make any investigation to determine whether that was a fact or what the grades were?

A. I didn't consult the profiles of the line but the grades seem to be almost level for a considerable distance on either side of the crossing.

Q. Assuming that there was a grade on either side approaching that crossing, wouldn't it be very impractical to put in a connection track in the throat of that crossing from one line to the other?

A. Well, I am not willing to assume that there is a grade there. I don't think there is.

Q. At Oakesdale, how about the grade?

A. There is an overhead crossing there some distance the other side of the station. The tracks are on the same level at the station between the station building and the grade crossing many hundred feet between. They parallel one another at a difference of
253 elevation not amounting to a foot or foot and a half for a considerable distance.

Q. Now, at Waverly, you say the connection between the O. R. & N. and Spokane & Inland would be necessarily made on the land owned by the Corbins there?

A. Well, I don't know, I understand it is reputed to be owned by the Corbins.

Q. And that is practically the only industry there, is that beet establishment?

A. I don't know as to that.

Q. How large a place is Waverly?

A. Why, it is a town, I should say, of several hundred inhabitants.

Q. A small town.

A. It is not a large town.

Q. About what is the population of Rosalia?

By Mr. FALKNOR: I object to that for the reason that it is improper cross-examination.

By the CHAIRMAN: The objection is overruled.

A. I understand the present population of Rosalia is over thousand.

By Mr. FALKNOR: I don't think that is proper cross-examinat We are only trying to prove by him this one feature of the case—

This witness being recalled by the Commission testified furthe follows:

Q. Mr. Church, have you a blue-print showing the situation the railroads at Pullman?

A. I have.

Q. What railroads converge at that point?

A. The Northern Pacific and the O. R. & N.

Q. Do they have an intersection?

254 A. They cross; they have no connection.

Q. Is there any way of transferring cars from one roa the other?

A. No, sir.

Q. Are the railroads, as shown on this plat, correctly represe there?

A. Yes, sir.

Q. With regard to their location?

A. Yes, sir.

Q. Did you personally inspect it?

A. I did, sir.

Q. What about the possibility of making a connection at t point, and transferring the cars of one road to the other?

A. It is possible and practicable.

Q. Does your record show at what point?

A. It does.

Q. At what point?

A. Between the lines AA and BB on the blue print submitt

Q. Just draw a line, in the manner in which—the line is dra upon the map. Mark that by "X". How long would that l probably be?

A. Five hundred feet.

Q. What would be the cost of making the connection?

A. Fourteen hundred and forty-six dollars, approximately.

Q. Are there any lands that would have to be acquired?

A. I understand that lies within the right of way of the road.

Q. Any intervening obstructions there?

A. No, sir.

Q. Any buildings?

A. No, sir.

By Mr. FALKNOR: We offer this blue-print in evidence, to marked Exhibit —.

255 Cross-examination.

By Mr. GROSSCUP:

Q. You have had no personal experience in the operation o railroad?

A. I have been connected with railroads before I came to

commission.

Q. Have you had any experience in operating?

A. Not in operating, no, sir.

Q. Operating trains; making transfers, etc.?

A. No, sir.

Q. If Mr. Buckley has stated, that in addition to the actual track connections, there must be a track on which cars intended for transfer must be placed by either road, you are not prepared to dispute that?

A. No, sir. I am prepared to say that that amount of track can be put in, at all places I visited, necessary for transfer.

Q. You haven't provided, at any of those places, for a transfer track, upon which the cars of one road could be set out, and to take up the cars of the other road?

A. I have talked the matter over with both Mr. Palmer and Mr. Buckley, and we have decided just where those transfer tracks could be. Records and statements that I am to submit later contain the amount of track necessary at these points.

256 None of the photographs, maps, or plats referred to and identified by the foregoing witness in the course of his testimony were certified by the Commission to the Superior Court of Thurston County as a part of the evidence taken before the Commission in response to the proceedings in review herein or otherwise, nor were any of the said maps, plats or photographs returned to said court or filed in connection with the evidence certified and returned by the commission or otherwise, and none of the said maps, plats or photographs were exhibited to the court in which these proceedings were had, nor were the same in any way referred to or used or considered in connection with the final decree entered herein.

There was returned as a part of the return to cause No. 3616, and considered at the hearing in this cause, a Railroad Map entitled, "Railroad Commissioners' Map of Washington, 1907." A lithographed duplicate of the same is hereto attached and made a part hereof.

257 *Evidence Offered and Received in Behalf of the Oregon Railroad & Navigation Company.*

A witness, B. E. PALMER, being called testified as follows:

Direct examination.

By Mr. GROSSCUP:

Q. Mr. Palmer, you are General Superintendent of the Northern Pacific Railway Company, having jurisdiction over the lines west of Helena?

A. Yes sir.

Q. You are familiar with the lines of the west?

A. Yes, sir.

Q. Mr. Palmer, you may explain to the Commission any inconvenience there would be, if there would be such inconvenience, or danger arising from a crossing of your main line by a switch or a

transfer track from the Oregon Railroad and Navigation Compan to the Spokane and Inland at Oakesdale.

A. A switching track would be even more dangerous than an ord nary grade crossing. We have an agreement with the electric lin that their regular crossing must be interlocking and I would consid it just as important to interlock a switch track as the main line.

Q. Where would be in Eastern Washington, in your judgmen the natural place for a joint interchange, south of Spokane, bein one now at Garfield; what would you say as to the necessity of havin another one?

A. Well, I should think that that would probably cover th ground very thoroughly on a joint interchange.

Q. Can you see any necessity for a crossing at Farmington?

A. No, sir, that is the end of our line. We have a little spur trac in there and we don't get much business there anyhow.

Q. Then aside from Garfield, in your opinion, could all th
258 transferring that is required in that country be done at Ga field?

A. Yes, sir, I believe it could.

Q. Without discommoding anybody?

A. Yes, so far as we are concerned.

Q. Are there any operating expenses connected with track conne tions or transfer of cars between two or more lines?

A. Always. I think that is illustrated in the ordinary switchin We usually get a switching charge in the ordinary interchange i cities and our expense is usually more than that.

259 A witness, M. J. BUCKLEY, being called testified as follows

Direct examination.

By Mr. SPENCER:

Q. You are General Superintendent of the Oregon Railroad an Navigation Company for the lines of Railroad in Oregon, Washin ton and Idaho?

A. Yes, sir.

Q. You have been previously superintendent of the lines in Was ington?

A. Yes, sir.

Q. You heard the testimony here about making these track co nections between the different lines at these different points? No I take up first Waverly between the Oregon Railway & Navigatio Co., and the Spokane & Inland Co., is there any considerable traff offered tributary to Waverly, to justify or warrant the connectio there?

A. Not that I know of.

Q. Take up the next point at Thornton, between the Oregon Rail way & Navigation Co., and the Spokane & Inland Railroad Co.

A. I don't know of any there.

Q. Well you would be conversant with it if there were any woul you not?

A. Yes, sir. If any was offered there.

Q. At Oakesdale, all three roads go into there. What is the necessity for physical connection of tracks there?

A. I have never had any request of interchange of any traffic there, none offered that I know of.

Q. At Farmington between the Northern Pacific and Oregon Railway & Navigation Co.?

A. Just the same way.

Q. How about Garfield? Is there a connection at Garfield?

A. There is between the Northern Pacific and the Oregon
260 Railway & Navigation Co., and at Pullman between the Northern Pacific and the Oregon Railway & Navigation Co.

A. There is no connection.

Q. Is there any request for interchange there or any business to call for interchange?

A. No, sir. I never heard of any.

Q. Colfax on the line of the Spokane & Inland?

A. I believe the Spokane & Inland is not constructed up to Colfax at this time.

By the CHAIRMAN: I think they are there by this time.

By Mr. SPENCER:

Q. Is there any connection is there any need for a connection there between the Spokane & Inland and the Oregon Railway & Navigation Co., in order to accommodate business?

A. None that I know of, no, sir.

* * * * * * *

On cross-examination by Commissioner LAWRENCE, this witness further testified:

Q. At Waverly there is a beet sugar factory?

A. Yes, sir.

Q. Is there any considerable shipment of pulp?

A. Yes, sir.

Q. Suppose there was a shipment for a point intermediate to Spokane would it not be necessary to have track connections in order that that shipment might be made from a point on the Spokane & Inland. Now supposing that a party living just north of Waverly on the Spokane and Inland say west of Fairfield, desired a car load of the beet pulp would it not be necessary to avoid a long haul they would have to haul it to Spokane?

A. No, sir not necessarily.

Q. How would it be hauled without breaking bulk?

261 A. Just have the Spokane & Inland extent their track up to the pulp mills.

Q. Suppose that a person living at, we will say, at Latah on your line desired to make a shipment of household goods to West Fairfield on the Spokane & Inland the natural point of interchange would be at Waverly would it not?

A. No, sir.

Q. If it was to be hauled in car load lots?

A. No, the natural interchange point under present condition would be Spokane.

By the CHAIRMAN: Under the present conditions?

A. Yes, sir.

Q. But then that would be three times the direct distance by th way of Waverly?

A. Yes, sir, quite an additional mileage.

Q. It would be a distance of approximately seventy-five miles a compared with the near by distance of about ten miles would it not And would not naturally the point of exchange for this shipment i there were physical connections at Waverly be at that point?

A. Yes, sir.

Q. If there were any facilities for interchange that would be th natural point, the facilities would be necessary for a shipment of tha kind?

A. Yes, sir.

Q. It would be also true from Fairfield from a point on the Spo kane & Inland just south of Waverly like Springvalley?

A. Yes, sir.

Q. There are frequent shipments of household goods on your line

A. Yes, sir, but not to any extent. They like a shipment say from West Fairfield to Waverly. I don't think that that would b done. The chances are that they would haul it to Wes
262 Fairfield by wagon.

* * * * * * *

On further cross-examination by Commissioner FAIRCHILD, th witness testified as follows:

Q. You looked over the station plats furnished by Mr. Church did you not?

A. Yes, sir.

Q. And did you look over his general estimate of the cost of mak ing connections?

A. Yes, sir, in a general way.

Q. Now, generally, were these amounts correct?

A. Generally speaking, I would say so; yes, sir.

Q. And the amounts with reference to the connections, as testi fied to by him were practically correct in general?

A. Well, I didn't hear his testimony, but I will say this much that the proposition as set forth on those copies that I looked at yes terday were simply connections, but the connection is not necessary for a transfer of facilities. In order to interchange business with another company it is necessary for the two lines to get together and agree on the necessary facilities. We do not want the Northern Pacific running its trains and its engines over on our tracks, and they do not want our cars and equipments over on their tracks, and so we want an independent track where we can set this transfer business. In those plans that have been submitted that had not been considered.

Q. But what I mean was that the plans showing the physical condition is practically correct?

A. Yes, sir.

By Commissioner LAWRENCE:

Q. Why could not these connecting tracks be used for transfer tracks?

263 A. Well, most of the connecting tracks that were shown on those plans were tracks that are already in use as warehouse tracks, or something of that kind. We could not establish somebody's warehouse track as a connection track and every time we wanted to transfer a car go in and bump him out of the way. We want tracks that are free to be used exclusively in the interchange purposes.

By Mr. SPENCER:

Q. You say that that is absolutely necessary in order to make transfers?

A. Yes, sir. It is absolutely necessary. It all depends on the amount of business to be transferred as to the extent of the facilities; sometimes one track will do and sometimes two are necessary.

By Commissioner LAWRENCE:

Q. When you speak of the necessity of connecting tracks at the points named, you are speaking about it from the practical railroad stand-point—an operating stand-point?

A. No; I am speaking about it in that way because I am quite familiar with the business that is handled in interchange.

Q. What I mean is, that you are not taking into consideration the requirements of the station on this side?

We consider that you shall put in those tracks.

A. I don't know a thing about that.

264 This witness, likewise, on re-direct examination, testified further as follows:

Q. You were asked about this traffic at Waverly. Now, a connection at Garfield would serve all purposes of a connection at Waverly would it not?

A. As far as I am able to learn, yes. I say that in this way: That every time we interchange cars with another line, we ru/ up a bill of expense, and we also help to increase the car shortage, because in interchanging cars with another line, there is a delay that does not exist in connection with a car moving entirely over its own line, and we look upon that in the light of ordinary switching, and this frequent interchange and common practice of doing business on a switching charge, ties up equipments. In fact, I have no hesitation in saying that this is one of the princip/e causes for the present car shortage.

265 *Bill of Exceptions.*

This cause was called for hearing on the 19th day of January, 1908, and thereupon the petitioner and relator by its counsel, and by competent and non-cumulative evidence in that behalf produced at the trial, offered proof in support of the issues joined between the petitioner and relator herein and the Railroad Commission of the

State of Washington in the matter of the complaint filed by and
fore said Commission charging a lack of and necessity for cert
track connections between the lines of relator herein and the Spok
and Inland Railroad Company at Waverly, Thornton and Colf
and between the lines of railway of the Petitioner and the North
Pacific Railway Company at certain other points in the compla
mentioned, and between the lines of railway of the petitioner
relator and the Northern Pacific Railway Company at certain ot
points in the complaint mentioned.

And among other things, petitioner and relator, by its coun
offered to submit competent and non-cumulative evidence and
manded that the same be received, which if received, would te
to show among other things that there was no necessity for su
tract connections at either of the points or places as in and by
complaint of the Railroad Commission track connections were pra
for; that no public convenience would be subserved by either
such track connections, and that the lines of travel, trade and tra
were such that the same would not be aided, nor would any busi
either passenger or freight be subserved by either of such track c
nections;

That the relator is an Oregon corporation organized and engaged
railway inter-state transportation of both passengers and freight
tween the states of Washington and Idaho, and the States of Wa
ington, Idaho and Oregon, and its principal business was
266 such inter-state carrier;

That the Spokane and Inland Railroad Company wa
Washington corporation engaged in operating an electric line
railway wholly within the State of Washington, and was not ope
ing any steam railway;

That the Northern Pacific Railway Company was an interst
carrier engaged in inter-state traffic and transportation between
States of Oregon and Washington, and between the State of Wa
ington and other states and territories of the United States, and
principal business was interstate traffic.

That to make the track connection between the lines of the
lator and those of the Northern Pacific Railway Company at
town of Connell would involve an expenditure of $1020.00
would require in addition contracts and agreements in relat
thereto between the relator and the Northern Pacific Railway C
pany, and the condemnation or other means of acquisition of
right to lay tracks over the right of way of the Northern Pac
Railway Company for the purpose of such track connection.

That a track connection at the town of Colfax between the li
of the relator and the Spokane and Inland Railroad Company
demanded and proposed by the respondent commissioners in
judgment order requiring the same was impracticable, but tha
practicable track connection was possible between the said lines
the said town of Colfax at one other point other than that propo
by the respondent commissioners, the expense of which would
$980.00, but to establish which would require and demand the
curing of a franchise to lay such connecting track over one of

public streets of the said town of Colfax, and would further require contracts and agreements to be entered into for the making of the same, and for their maintenance between the relator and
267 said company.

That the track connection proposed and demanded by the respondent commissioners between the lines of the relator and those of the Spokane and Inland Railroad Company at the town of Waverly was not practicable, and as proposed involved and required the securing of rights of way for the laying of such track over private property not owned or controlled by either the relator or the said Spokane and Inland Railroad Company; but that a practicable track connection could be made at one other point at said town of Waverly other than that point ordered by the commission between the relator's lines and those of said Spokane and Inland Company which could be made at an expense of $5270.00, but which practicable track connection would involve the securing by condemnation proceedings or otherwise, rights of way over real property not owned or controlled by either of the said lines, and would require contracts and agreements between the said lines for the making of the said track connection and the maintenance thereof;

That in relation to the track connection demanded and proposed by the respondent commissioners between the lines of the relator and the Spokane and Inland Railroad Company at the town of Thornton, such track connection would require the securing of rights of way over the property and right of way of the Spokane and Inland Railroad Company, and exclusive of the cost of such right of way, such track connection proposed and ordered by the respondent commissioners would be the sum of $3960.00, and such track connection would require contracts and agreements between the relator and said Spokane and Inland Company for the making of the same and for its maintenance; that the main line of the relator's interstate railway and that of the Spokane and Inland Railway Company cross each other at grade at the point where
268 the track connection between the said two lines was demanded and proposed by the order of the said commission, and that to safe-guard the grade crossing between the said lines an interlocking switch appliance ought to be established, negotiations for which were pending, and that the proposed track connection proposed by the commission would interfere with the making possible of such inter-locking switch appliance; and that any track connection at the point and place by the commission ordered at said town of Thornton could be made at an expense of not less than $3960.00 exclusive of rights of way therefor, and to make any track connection rights of way over real property not owned or controlled by either of the said lines would be required to be secured;

That to make the track connections ordered and demanded by the respondent commissioners by the order under consideration between the lines of railway of the relator and of the Northern Pacific Railway Company and the Spokane and Inland Railroad Company at the town of Oakesdale would involve the necessity of laying an additional track in addition to the one proposed and or-

dered by the commission, for which additional track, track connections between the said lines would be impossible, and the expense of such track connections would be $6240.00 exclusive of the rights of way therefor, and which track connections would involve the use between the lines by the one of the other's right of way for such track connections, and would involve contracts and agreements between the said lines therefor, and regulating such use and any interchange by means of such track connection;

That the track connections proposed and ordered by the respondent commissioners at the town of Farmington between the lines of the relator and those of the Northern Pacific Railway Company at the point by the Commission ordered was not practicable as demanded by the said respondent commissioners, but that
269 by an additional track in addition to the track so proposed and demanded by the said commissioners such track connection could be made, the expense of which practicable connections would be the sum of $3520.00, exclusive of rights of way necessary to be acquired therefor, and that track connections at said point as ordered by the said commission could not be made without first acquiring franchises over the public streets of the said town of Farmington;

That the track connections proposed and ordered by the respondent commissioners between the lines of railway of the relator and of the Northern Pacific Railway Company at the town of Pullman were not practicable as proposed and ordered by the said commissioners except by the establishment of two additional tracks, the total cost of which track connections exclusive of rights of way and franchises therefor would be $3200.00, and to make track connections between the said lines at the said town would require the securing of franchises to lay tracks over the public streets of the said town of Pullman, and would further require contracts and agreements between the two said lines for the making of the same, the use of each other's rights of way and contracts and agreements for the maintenance of said track connections;

That to make the track connections by the respondent commissioners proposed and ordered between the lines of railway of the relator and the Northern Pacific Railway Company and of the Spokane and Inland Railway Company at the town of Garfield as proposed and ordered by the respondent commissioners would require an expenditure of $2665.00 exclusive of rights of way therefor, and that to make such track connections, the use by each line of the other's rights of way would be necessary, and would require contracts and agreements therefor, and in relation thereto contracts and agreements between the said lines regulating the proposed and ordered interchange;

270 That to make any of the track connections at either of the places demanded and proposed by the respondent commissioners would require condemnation proceedings to condemn real property and rights of way for the purpose of laying tracks and for the use thereof over property not owned or controlled by the relator and would require and demand by the relator contracts

MAP:

TOO

LARGE

FOR

FILMING

and agreements between the relator and the several companies between whose lines of railway and those of the relator the track connections proposed and demanded were ordered, and that no public business or public convenience would be subserved or could be subserved by either of the track connections demanded and ordered by the commissioners.

But upon due consideration of the offer of proof by the said relator the court rejected the same, and excluded all evidence by the relator so offered, and declined to receive the same, and refused to permit any such evidence to be introduced or to permit witnesses to be sworn, and held that under the statute of the State of Washington creating a Railroad Commission and defining its duties and powers, no evidence could be introduced before the court in this cause, and that this cause must under the said statute be tried upon such testimony as may have been taken before the Railroad Commission.

Thereupon the court proceeded to try the said cause, and to render a judgment therein, to which ruling of the court in so refusing to permit evidence of the character offered to be produced and to the entry of the judgment herein, the petitioner and relator, by its counsel, in open court duly excepted on the ground that said ruling of the court deprived the relator of its property without due process of law, and denied to it the equal protection of the laws contrary to the 14th amendment to the constitution of the United States,
271 which exception was by the court then and there allowed.

STATE OF WASHINGTON.
County of Thurston, ss:

I, O. V. Linn, Judge of the above entitled court, do now hereby certify that the matters and proceedings embodied in the foregoing statement of facts and bill of exceptions are matters and proceedings occurring in said cause and the same are hereby made a part of the record herein, the same having been presented within the time allowed by the court therefor pursuant to stipulation of counsel of the parties in interest herein.

The foregoing statement of facts contains all the material facts, matters and proceedings heretofore occurring in said cause and all of the evidence returned and considered in the matter of the order complained of and sought to be reviewed by these proceedings.

I further certify that the foregoing bill of exceptions correctly states the offer of evidence made at the trial by and in behalf of relator herein, the rejection of the same by the court and the exception thereto by the relator by its counsel taken and by the court allowed.

O. V. LINN, *Judge.*

(Here follows map marked page 272.)

[Endorsed on map:] No. 3606. In the Superior Court of the State of Washington for Thurston County. The State ex rel. Oregon R. R. & Navi. Co. v. Railroad Commission of Washington. Statement of facts & Bill of Exceptions. Filed in Superior Court Thurston Co., Wash., April 11, 1908, W. M. Nunn, Clerk.

#3306. In Superior Court State of Washington, County of Thurston. State ex rel. O. R. & N. Co. v. R. R. Commission of Washington. Exhibit to Statement of Facts. Filed in Superior Court Thurston Co., Wash., April 11, 1908. W. M. Nunn, Clerk.

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273 & 274 No. 7613.

Filed Mar. 1, 1909.

STATE OF WASHINGTON on the Relation of OREGON RAILROAD AND NAVIGATION COMPANY, Appellant,

v.

RAILROAD COMMISSION OF WASHINGTON, and H. A. FAIRCHILD, John C. Lawrence, and Jesse S. Jones, Members of and Comprising and Constituting said Commission, Respondents.

This is an appeal by the railroad company from a judgment of the superior court for Thurston county, affirming as reasonable and lawful an order of the railroad commission, ordering certain track connections between the appellant's lines of railway and the lines of the Northern Pacific Railway Company and the Spokane & Inland Railroad Company. A statement of facts and bill of exceptions was settled by the trial court, in which the evidence considered by the court below and a statement of the exceptions reserved were set out. On May 13, 1907, the commission caused to be filed with itself, as complainant, a complaint against the railroads interested, which, among other things, complained of the lack of track connections between the appellant's lines of railway and other railways in Eastern Washington. The complaint was verified by the chairman of the commission, and prayed for the interchange of cars, at Oakesdale and Garfield between the Northern Pacific, the Spokane & Inland and the O. R. & N. Company; at Connell, Pullman, and Farmington, between the Northern Pacific and the O. R. & N. Company; at Waverly, Thornton and Colfax between the O. R. & N. Company and the Spokane & Inland; at Rosalia and Palouse between the Northern Pacific and the Spokane & Inland. Citation was duly issued, directing the attendance of the interested railroads. The appellant appeared in response to the citation, filed its objections to the jurisdiction of the commission, and filed an answer. The
275 hearing being had, an order was made directing track connections to be made by the interested railroads as above indicated, and dismissing the petition as to the track connections at Rosalia and Palouse. We have considered this case in connection with the case of State ex rel. Great Northern Railway Company v. Railroad Commission, No. 7616, as most of the questions involved

in the latter case are involved in the case now under discussion, although this case raises some additional questions. But the arguments and citations of authority in both cases will be considered in the discussion of this case. The order for track connections having been served, the appellant in due course filed a petition to review the order of the commission, in the superior court of Thurston county. A writ was issued and, pursuant thereto, a hearing was had upon the proceedings, and evidence certified by the commission to the said superior court.

Here we may notice an objection raised to the manner in which the testimony in these different cases was certified. The complaint was an omnibus complaint, and the commission in its return referred to the evidence in certain other cases as evidence taken in the matter of this cause concerning the track connection order; and it was stipulated that the evidence referred to by the commission did contain the evidence which was taken in this case. We see no real objection to this manner of certifying the testimony or statement of facts to the superior court. It is not contended that the evidence in the case was not certified, and the particular form in which it was certified seems to us not to be material. The cause coming on for hearing, the appellant offered at the trial to produce and introduce before the court competent material and non-cumulative evidence affecting the merits. The court refused to permit the evidence to be introduced or to permit witnesses to be sworn in support of the offer, holding that, under the statute creating a railroad commission and defining its duties and powers, no evidence could be introduced before the court in the case, and that the cause was required to be tried upon the testimony taken before the commission; to which ruling the appellant duly excepted on the ground
276 that the ruling of the court deprived the appellant of its property without due process of law and denied to it the equal protection of the laws, contrary to the fourteenth amendment to the constitution of the United States. With the view we take of the law it is not necessary to produce here the testimony offered. Various assignments of error are made, but they are more in the form of assertion of what the law is than of the ordinary and regular assignment; so that we will consider the merits of the assignments as they are presented by the briefs and arguments.

The first contention of appellant is that the railroad commission law does not confer power or authority to institute an inquiry before the commission upon the question of track connections, or permit the commission to make any orders in respect thereto. The railroad commission law was passed in 1905, and it is conceded that, under the provisions of that act, the action of the commission complained of was not authorized; at least, the commission doubted its authority to act in the premises, and the act was amended in 1907. (Session Laws, 1907, chap. 226, p. 536.) It is contended by the appellant that the power given by such amendments did not confer the power of trackage connection. Section 3, page 538, of the laws of 1907, vests the commission with power, upon complaint made, to make regulations concerning the sufficiency of the trackage, rail-

road connections, siding, equipments, etc., and to order that addi tional trackage or siding be constructed. It is contended by the appellant that this does not make provision for physical track con nections. However, from a reading of the whole section, we are con vinced that the legislature intended to confer power upon the com mission to compel the making of physical track connections, and that this is in harmony with the spirit of all the provisions of the act.

It is next contended that, if it should be held that the commission law does confer such authority, such power will be found to have been conferred by virtue of the laws of 1907, and that the amend-
ments of 1907 were not in force when the hearings in this
277 case were instituted and citations served. This contention we think is absolutely untenable. The law of 1907, includ ing the amendments under discussion, was approved March 16, 1907, and the proceedings in this case were instituted in May, 1907. Sec tion 21, the last section in the act of 1907, prescribes that there shall be added a section to be designated as section 39, providing that "an emergency exists and this act shall take effect immediately." It is not reasonable to conclude that the intention of the legislature was to enact an emergency clause to take effect upon an act of the legis lature which had been in effect for two years prior thereto. The natural and obvious conclusion is that the emergency clause was in tended to apply to the provisions of the act of 1907.

The next and probably most important contention of the appel lant is that, if the amendments to the commission law of 1907 were in force and shall be construed as being intended to confer authority upon the commission in respect to track connections of railroads, then the legislation is void as a delegation of legislative authority which by the constitution of the state was lodged with the legisla tive assembly, because as is claimed, if any power has been intended to be conferred, it is the bald power of arbitrary determination as to when, where, and under what conditions track connections may be ordered and who shall pay for the same. It is admitted that, while the power of regulation of carriers may be exercised by the state directly by its legislature or through the medium of the com mission, yet the legislature must itself determine a standard for regulation by which the commission shall be guided, and it is asserted that this has not been done by the legislation in question, and that the action of the commission under consideration is an ex ercise of purely legislative authority. It is conceded by the appel lant that the state may regulate railways, and that this regulation may take the form of ordering track connections between railroads under appropriate conditions; but it is contended that, before power can be conferred upon such sub-agency, the legislature itself, by
legislative declaration, must establish standards or principles
278 of regulation by which the commission shall be guided. For the purpose of the decision in this case it may be conceded now that the authorities cited by the appellant sustain the proposi tions contended for by appellant, viz: That use and enjoyment of property are essential attributes to property an interference with

which constitutes a taking of property; that railway property impressed with a public use can be regulated whether the regulation take the form of a regulation of rates or of enforced track connections, but that this power of regulation is not unlimited; that all regulation by the state must be just and reasonable, and that the question of the reasonableness or unreasonableness of the regulation is essentially a judicial question, and that the owners of railway property against whom regulation is sought to be enforced have a right to demand from the courts an inquiry as to the validity of this interference and submit to a court as a judicial question all controversies which may arise as to the lawfulness or reasonableness of the regulation. But an examination of the cases cited convinces us that they have no application to the case at bar, for the reason that the right to a judicial determination of the questions involved in the controversy—the main proposition—is accorded to the appellant in this case by the law of 1907.

One of the main cases relied upon by appellant here and also by appellant in case No. 7616, is Chicago etc. R. Co. v. Minnesota, 134 U. S. 418, but that case was decided expressly upon the theory that no judicial determination was permitted. Justice Blatchford, in writing the opinion for the court in that case, said:

"The construction put upon the statute by the supreme court of Minnesota must be accepted by this court, for the purposes of the present case, as conclusive, and not to be re-examined here as to its propriety or accuracy. The supreme court authoritatively declares that it is the expressed intention of the legislature of Minnesota, by the statute, that the rates recommended and published by the commission, if it proceeds in the manner pointed out by the act, are not simple advisory, nor merely prima facie equal and reasonable, but final and conclusive as to what are equal and reasonable charges; that the law neither contemplates nor allows any issue to be made or inquiry to be had as to their equality or reasonableness in fact; that, under the statue, the rates published by the commission are
279 the only ones that are lawful, and, therefore, in contemplation of law the only ones that are equal and reasonable; and that, in a proceeding for a mandamus under the statute, there is no fact to transverse except the violation of law in not complying with the recommendations of the commission. In other words, although the railroad company is forbidden to establish rates that are not equal and reasonable, there is no power in the courts to stay the hands of the commission, if it chooses to establish rates that are unequal and unreasonable."

It certainly cannot be contended that our statute could be so construed, for the statute itself especially provides for a review by the superior court, from which court there is an appeal to the supreme court of the state. It is given a review, not only upon the regularity of the proceedings, but upon the merits. It is true that the statute provides that the court shall hear the case only upon the testimony that is taken before the commission; but it also provides a complete remedy if the commission refuses to accept competent testimony, and if it admits incompetent testimony, of course, the

reviewing court would simply disregard it. The supreme court of this state is bound by the testimony which is introduced in the superior court and comes up in the statement of facts, and yet it could not well be said that litigants are deprived in any way of obtaining the judgment of the supreme court on questions which have been litigated in the superior court. The statute provides in so many words that any railroad or express company affected by the order of the commission and deeming it to be contrary to the law may institute proceedings in the superior court of the state of Washington in the county in which the hearing before the commission upon the complaint has been held, and have such order reviewed and its reasonableness and lawfulness inquired into and determined. Time is given to take this review. All the testimony upon which the commission acted is brought before the court, and we are utterly unable to conclude that the question is not finally determined by a judicial arbiter.

Many statements are made by counsel for appellant in regard to the provisions of the statute; for instance, it is asserted by the appellant in No. 7616 that this legislation is cunningly devised to give to the common carrier the right to a proceeding which is a judicial investigation in name only, and utterly lacking in the substance and quality of an ordinary judicial proceeding, and to prohibit
280 the courts from pursuing any line of investigation except that which has been dictated by the commission, or having before it any facts or evidence except such as the commission may determine. On page 98 of appellant's brief it is asserted that the vice of the statute consists in limiting the court in such inquiry to such evidence as the commission may see fit to take or certify, but a perusal of the statute itself shows that there is no justification for such assertions. Section 5 of the laws of 1907 provides as follows:

"And the court before which such hearing is had in case it finds any such findings so sought to be reviewed unjust, incorrect, unreasonable, unlawful or not supported by the evidence, shall make new and correct findings to take the place of such as may not be sustained, unless such findings are set aside and reversed for error on the part of the commission in rejecting evidence properly proffered, in which case it shall remand such hearing to the commission with instructions to *receive the evidence so proffered and rejected,*"

a provision which flatly contradicts the statement that the evidence before the court is limited in inquiry to such evidence as the commission may see fit to take or certify. Appellant also states, on page 113 of his brief, that there is no provision whatever for any review by the superior court of any decision which the commission may make in the course of its proceedings, either in rejection or receipt of evidence which may be offered, or any review provided for any error in ruling in the course of the examination of witnesses. The portion of the statute which we have read equally answers this statement. The statute goes further and provides an appeal to the supreme court of the state, and provides that:

"In case the supreme court finds any finding so sought to be re-

viewed unjust, incorrect, unreasonable, unlawful or not supported by the evidence, it shall either make and render proper findings or remand the same to the superior court with instructions to make proper findings on the evidence already submitted, *unless the same is reversed for error in rejecting evidence properly proffered, in which case the hearing shall be remanded to the commission with instructions to receive the evidence so proffered.*"

The statement, that if a witness shall appear and refuse to testify there is no means of compelling testimony, is also answered by the statute as follows:

"The said commission before which the testimony is to be given or produced, in case of the refusal of any witness to attend, or testify, or produce any papers required by the subpœna, shall report to the superior court in and for the county in which the proceedings is pending by petition, that due notice has been given of the
281 time and place of attendance of said witnesses, of the production of said papers, and that the witness has been summoned in the manner provided in this act, and that the fees and mileage of the witness has been paid, or tendered to the witness for his attendance and testimony, and that the witness has failed or refused to attend or produce the papers required by the subpœna, before said commission, in the cause or proceeding named in the notice and subpœna, and ask an order of the said court, compelling the witness to attend and testify before the said commission. The court upon the petition of the commission shall enter an order directing the witness to appear before the said court at a time and place to be fixed by the court in such order, and then and there show cause why he has not responded to said subpœna."

It then provides that, in case the witness does not purge himself, he shall be dealt with as for contempt of court. It is true that there are no penalties for perjury, but the general law on the subject of perjury provides for that. The penalty for perjury is not necessarily provided in every statute that provides for the taking of the testimony of a witness. These statements are repeated in many forms, and arguments are based upon the assumptions of the statements, and authorities are cited in support of the unconstitutionality of a law such as is indicated by the statements made; but as we have seen, the statements not being justified by the law itself, such authorities are not in point, and we have therefore not reviewed them.

It is insisted that, inasmuch as the commission makes out the complaint, the commission is an accuser, and it is treated by the arguments of counsel as a tribunal in opposition to the just interests of the railroad companies. This court cannot act on such an assumption. The commission was provided for, not for the purpose of interferring with any just and legal rights of the railroad companies or other corporations, but as a mediatory court standing between the private interests of the country and the interests of the carriers; and the fact that the complaint in response to petitions is made by the commission formally is not such a fact as would warrant the assumption or suspicion that the commission was not acting justly and impartially. It is true that the forms of law and pro-

cedure under which this commission is acting are not in all res
like the forms and procedure governing other courts, and in
language of many of the cases cited by the counsel for the appel
and repeated by the appellants themselves in their argum
282 in some respects "it is not a proceeding under the forms
with the machinery provided by the wisdom of succe
ages." But it occurs to us that it makes no difference whether
proceeding under the form and with the machinery provided by
wisdom of successive ages, or whether it is under the powers
proceedings provided by this age. Law is a progressive science
must necessarily regard the changing conditions of society and o
business of the country, and the legislature and courts of to
ought certainly to be as well qualified to provide machinery fo
guidance of a commission as was the law-making power two hun
years ago. The essential idea does not take cognizance of the
tiquity of the powers and machinery under which the commissi
acting, but of the question whether, under such powers and
working of such machinery, the respective legal rights of the
riers and the people are preserved. A careful examination of
whole act we think refutes the statements made by the attorney
appellant that the law is cunningly devised for the purpose of
venting railroads from obtaining just judgments, and repels
presumption that the commission provided for by the legislatu
appointed for the purpose of oppressing railroad companies.
think, on the contrary, the presumption must be that the com
sion will act with fairness towards all parties.

It is also objected that the law provides that the commission
limit the number of witnesses. We do not think this is an u
sonable requirement. With regard to the contention that a st
ard must be erected by the legislature for the guidance of the
mission, we think that question is answered by the law itself, w
provides in many places throughout chapter 226 that the enf
ment of these different provisions shall be just, fair, and reason
When this imposition is placed upon the commission, with the r
of the railroad company to appeal to the courts to determine
cially whether the action of the commission was just, fair, and
sonable, we think all constitutional rights are fully protected.

The contention is also made that the commission act provide
the intermingling of legislative, executive, and judicial po
283 If we have given the statute proper construction, the
cessions made by counsel for appellant as to the charact
the commission laws which it is within the powers of the legisla
to enact, renders unnecessary a discussion of this proposition;
yielding the courtesy of discussion, while there is no question
the constitution of the state recognizes a division of the power
the state into three separate co-ordinate departments, viz., legisla
executive and judicial, it is well established that the special j
diction of each is understood to be applied in a limited sense, a
is not meant that they must be kept wholly and entirely dis
without any connection or dependence whatever or connecting
between them. Or, as was said by this court in Bellingham

Improvement Company v. New Whatcom, 20 Wash. 53, if all quasi judicial powers were taken from administrative and executive officers, the courts would be incumbered with useless litigation, and the administration of the government would become so expensive that it would be intolerable. This question was examined at length in that case and many cases reviewed, and the logic of the opinion and the conclusion reached is opposed to appellant's contention. In addition to this, no case has been cited by appellant, nor have we been able to find any, which sustains the view contended for. As to the public necessity for the track connections, we are not prepared to say that the finding of the commission in that respect was not justified by the testimony.

It is also contended by appellant that the law is unconstitutional because of the alleged excessive penalties which follow the refusal to comply with the order of the commission. This, in any event, would affect the constitutionality of only that portion of the act in relation to penalties. But, as counsel for appellant and respondents both agree that the penalties are not involved in this case, for the reason that the order of the commission provides for a subsequent order specifying the proportionate amount to be made by each of the railroads of the expense of making such connections, and that such subsequent order has never been made, we will decline to pass upon the question until it is a material issue in a case pre-
284 sented.

Finding no error in the record, the judgment is affirmed.

DUNBAR, *J.*

We concur:

RUDKIN, *C. J.*
CROW, *J.*
FULLERTON, *J.*
MOUNT, *J.*

Chadwick and Gose, JJ., did not sit.

285 In the Supreme Court of the State of Washington.

No. 7613.

THE STATE ex Rel. OREGON RAILROAD AND NAVIGATION COMPANY, Appellant,

v.

THE RAILROAD COMMISSION OF WASHINGTON, Respondent.

To the Judges of the Supreme Court:

Believing that the Court has misunderstood the record of this case, the appellant presents this petition for rehearing upon the questions indicated below, viz:

First.

Does the Commission Act, as amended in 1907, confer authority upon the Commission to enter into a hearing as to the making of track connections, with authority to pass orders in respect thereto

which, if not obeyed, subject the railroads to the penalties provided for by the Act?

In respect to this question, the appellant contended in the brief filed that a proper construction of the Act, including the amendments of 1907, would not justify the exercise of such power. It was pointed out in appellant's brief that by the original act of 1905 no such power had been conferred. As a part of the history of the legislation it was shown that the Commission had been experimenting with the Act for a period of two years prior to the amendments of 1907, during which time there had been some hearings before the Commission, which had resulted in litigation begun in the United States Court, as a result of which it had been decided by Judge Hanford that the original act was void because it exempted electric lines

286 which were performing the service of steam roads from the operation of the act, in violation of the State Constitution forbidding class legislation; that the act was also void because under the mandatory provisions of the State Constitution a maximum rate law had been adopted which the Commission had undertaken to set aside under the construction which it had placed upon the original act creating the Commission. The Commission had made a report, dated December 31, 1906, of its two years' work under the original act, and among other things the Commission, as the result of its two years' experimentation, recommended certain amendments to the act, these recommendations undoubtedly being intended to suggest remedial legislation to cure defects which had been urged in the course of the litigation which challenged the constitutionality of the law, and to cure some defects which the experimentation of the Commission had disclosed existed in the act. The Commission had not in fact, during the two years' experiment. undertaken to direct any hearings as to track connections between railroads, nor did the Commission in its report recommending remedial legislation suggest or ask for any enlarged power in connection with the subject of track connections. It is therefore suggested in appellant's brief that historically speaking nothing had arisen either in the course of the litigation with the Commission or in connection with any public hearings which the Commission had inaugurated which related to the wisdom of any additional power in respect to track connections, and it was argued in view of these facts that the very uncertain language of the act of 1907 under which the Commission now claims power to order track connections could hardly be said to have conferred such power. It was pointed out also that no legislative guides had been given the Commission defining the general principles under which the Commission might order track

287 connections, and it was suggested that the absence of these legislative guides was a further indication of the construction which ought to be placed upon the amendatory act of 1907, as was it also urged that the lack of legislative guides resulted in a bald delegation of legislative power which would be unconstitutional. This latter suggestion is not now to be again urged here for a further reconsideration by the court, but the lack of legislative guides is urged as a reason why, properly construed, the Act of 1907 was

not intended to confer any added power in relation to track connections.

The only section of the act by which it can be argued that power as to track connections was intended to be conferred is Section 2 of the Act of 1907 which amends Section 3 of the original act.

Session Laws of 1907, Page 537.

Section 3 of the original Act did not confer such power, but it did undertake to confer power in relation to the making of rates. It did define the legislative standards which should govern the Commission in the making of rates. A question had arisen in connection with the litigation in the United States Court whether Section 3 of the original act had provided power to make joint rates where none were in existence, though had there been joint rates in existence the original section clearly indicated an intention to confer power on the part of the Commission to alter such joint rates. But the original act provides that before joint rates could be put into effect it must be shown that some injustice or injury would result to the shipper if joint rates were not established; and it likewise provided as to joint rates that where the railroads did not agree as to the apportionment of the rate the Commission might issue a supplemental order, after hearing, declaring the proportion of
288 the joint rate which each of the roads should receive; but it is the only section of the original act which permitted the Commission at any time to apportion between two railroads any joint duty of any kind.

Now, by Section 2 of the Act of 1907 amending Section 3 of the original Act some further radical changes were made in the law. For instance, the Commission was given power to put in a joint rate even though none were in existence; a provision of the old law practically providing for trial *de novo* in the event of any review of any of its orders was repealed and in lieu thereof it was provided that upon any such review the cause should be heard solely upon the testimony taken and certified by the Commission; and by Section 3 of the Act of 1907, amending Section 4 of the original law, it was no longer necessary to show injury as a prerequisite to the establishment of joint rates.

It is quite apparent from an inspection of Sections 3 and 4 of the original Act and those amended sections as amended by the Act of 1907 that their chief purpose related to the question of rate making and the extent or character of review which might be had of the Commission's order.

It is confidently suggested to the court that a more critical examination of both the old law of 1905 and the new, including the amended sections of the old, will fail to disclose any power on the part of the Commission to institute any hearings to determine by whom the cost of making track connections shall be borne; what proportion of the expense, if any, shall be borne by the prior road and what by the second; nor is any power conferred upon the Commission to make any order apportioning this expense by which the railroads can be bound.

It is now submitted, therefore, to the court whether or not the

amendatory act of 1907 can be properly construed as extend-
289 ing power to order track connections, since no provisions are made in the law whereby the Commission may enter into any hearing upon the question of the apportionment of expense, or make an order apportioning the expense. In other words, if the Commission has no power to apportion the expense, can it be said that the legislation is sufficient to enable the Commission to order track connections?

The Commission is a legislative body with a mixture of powers as indicated by the Court in its opinion. It is nevertheless a body of limited powers and can exercise only such as the Legislature clearly intended should be conferred upon it. And unless the Court can say that the Commission may arbitrarily apportion the cost of track connections, it does not possess the power, and if it be said that it have this arbitrary power then it is submitted that the legislation cannot be defended. Take, for example, the appellant's lines of railroad, almost all of which were constructed in the territory involved long before any railroad construction either by the Northern Pacific or the Spokane & Inland Railway, and if the Commission has the power to arbitrarily say who shall bear the expense, they have the power to say the O. R. & N. Company shall bear it. And yet such a burden could hardly be expected of the pioneer line and in favor of the subsequent lines.

Second.

Is it constitutionally necessary to the validity of State legislation undertaking to regulate railways that a judicial remedy to review the orders of the Commission be provided for? If so, has the legislation under consideration provided this judicial remedy?

By the opinion of the Court filed in this case it is conceded, as *was it* conceded in the briefs on behalf of the State, that some judicial remedy must be provided for conferring power upon the
290 courts to review the action of the Commission to test the reasonableness of the regulation proposed as well as the lawfulness; otherwise the legislation would be void under the Constitution of the United States as a taking of property without due process of law. It is affirmed by the opinion filed in this case that all legislation whether taking the form of ordering track connections or the form of rate making, or other character of legislation, must be reasonable else it is void; that the question of reasonableness is essentially a judicial question, and, as before stated, a judicial remedy must be provided for to determine the question of the reasonableness of the proposed legislation, whether made by the Legislature itself or by the creation of the Commission. These principles the Court affirms in its opinion, but the appellant invites a reconsideration by the Court and a rehearing on the question whether an act such as this which, while it confers power upon the court by review proceedings to determine the question of the lawfulness and reasonableness of the orders of the Commission, denies to the court power to ascertain its facts for the purpose of the exercise of the power to review and compels the court to consider only testimony which was

taken before the Commission, does in fact confer a judicial remedy within the constitutional doctrine which is admitted by the opinion; more especially since the same act conferring this limited power of review by the Court imposes upon the railroad company, in the event of review proceedings, the burden of proof to show that the orders of the Commission are unlawful or unreasonable. The power to judicially determine the rights of parties ordinarily must, to be effective, confer likewise a power to ascertain all facts, not merely to declare the law resulting from evidence which the legislative body itself or its Commission may have taken. The judicial power to hear and determine involves inherently the power to in-
291 vestigate as well as determine, and this power of investigation is not lodged with the Court since the investigation is made by the Commission, and by the Act the evidence taken by the legislative body is made conclusive upon the court. Is this the conferring of a judicial remedy within the constitutional rights of the property-owner? And how can the burden of proof which the statute imposes upon the railroad be responded to unless the right to submit proof in response to the burden is permitted? It must be borne in mind that it is only because railway property is subjected to a public use that justifies any regulation at all. Except for the fact that railway property is impressed with a public use, legislation undertaking to control its use or direct the manner of its use would be as unjustifiable as legislation which would undertake to interfere with the use of other property. Railway property being impressed with a public use, the right of reasonable regulation is conceded, but with the corollary that the question of whether the proposed regulation is reasonable must be submitted to the court with the power to ascertain facts as a basis for determining the question of reasonableness, else no judicial remedy has been provided for. Is not therefore the Act itself void because of lack of complete judicial remedy, or possibly is that part of the Act unconstitutional which forbids the court to ascertain its own facts? Justice Miller in the concurring opinion in the Minnesota case, which with others declares the necessity for judicial review to support legislation undertaking to regulate railways, states that the appropriate remedy for such purposes is a bill in chancery where the court can ascertain its facts and determine the law. While it is true that this concurring opinion is from one of the Judges only, it comes from one of the most eminent jurists of the Supreme Court of the United States.

292 Third.

If, however, it be conceded that the legislature in providing for judicial remedy may say that the constitutional right of judicial review has been provided for when provision has been made for a hearing in a court upon evidence taken before the legislative body or, which is the same thing, its commission, does it follow under the peculiar provisions of the present act under consideration that sufficient power has been given to this legislative body to ascertain the facts, so that it can be said that all of the guaranties in the right to take testimony have been provided for so as to satisfy the con-

stitutional right of judicial review? In other words, have sufficient powers of inquiry been lodged with the commission so that it can be said that body can take all the proof that ought to be taken or that a property owner has the right to require to be taken?

In the appellant's brief filed in this case, between pages 107 and 112, many criticisms are made upon the inefficiency of the Act in this respect and the insufficiency of the power of the Commission in the matter of taking testimony. It is not the purpose of this petition to repeat them. One of the criticisms so made, however, counsel preparing this petition frankly concedes is probably not well taken, viz: It was urged on page 114 of the brief that

"If a witness shall appear and refuse to testify there is no means of compelling testimony."

A closer analysis of Section 6 of the original Act, as well as that same section of the amended act, would seem to make the criticism unjustifiable, because by both the original and amended section it is in effect provided that upon report by the Commission to a court of the fact of the refusal of a witness to obey the subpœna process of the Commission, such court may enter an order that the witness appear before the Commission and testify; and probably also if a witness has appeared before the Commission without compulsory process but shall there remain mute, he could be reported and his testimony ordered.

293 Counsel adheres, however, to a further criticism made in that connection, namely, that it is extremely doubtful whether the provisions of the law in relation to the attendance of witnesses were intended to apply to witnesses other than the witnesses in behalf of the Commission; but passing that question and conceding that we are in error as to that, counsel respectfully submits that the other criticisms upon the act made in the brief are well taken, and that the learned Judge who wrote the opinion in this case has fallen into an error in his quotation of sections of the statute in response to these criticisms.

In the appellant's brief it was said in criticism of the lack of power of the Commission in the matter of taking proof:

"If the Commission shall reject evidence offered before it or shall have sustained objections to testimony which may be material and which may arise upon the cross-examination of a witness on behalf of the Commission, there is no provision for a review of the action of the Commission."

With due deference to the learned Judge who wrote the opinion in this case it is respectfully submitted that this criticism is well founded.

The Court in its opinion in this case quotes in response to this and some other criticisms in appellant's brief portions of Sec. 5 of the amendatory Act of 1907, which seemingly affirmatively provide for a review of the action of the Commission in receiving or rejecting testimony, but counsel respectfully invites the Court to a further examination of that section, feeling confident that such examination will disclose that Section 5 of the Act of 1907 has no relation whatsoever to the hearings before the Commission except the specific hearings and investigation provided for to ascertain the value of

railroads in the State. Where that examination is entered upon and testimony is improperly rejected or received the Superior
294 Court may undoubtedly reverse and remand the cause, with instructions to receive the testimony if it has been rejected and order new findings, and in the Supreme Court like power exists, but this procedure and such power is distinctly restricted by the terms of Section 5 of the Act of 1907 to hearings before the Commission in respect to the value of railroads, cost of construction, permanent improvements, and like character of investigation. Section 5 of said Act of 1907 reads as follows:

"SECTION 5. Section 12 of said Act shall be amended to read as follows: Sec. 12. The Commission shall ascertain as early as practicable the original cost of construction and equipment, the amount expended in permanent improvements and the proportionate amount of such permanent improvements charged to construction, and to operating expenses respectively, the present as compared with the original cost of construction, and the cost of reproducing in its present condition each mile of railway in the State. * * *"

The section in question also provides for review proceedings to review the findings of the Commission thereon, and does contain provisions quoted by the learned Judge who wrote the opinion in this case, to the effect that the Superior Court on such review may make new findings unless the findings are reversed for error in rejecting testimony, in which case it shall remand the matter with instructions to the Commission to receive the evidence and make new findings. And this same section then provides that in the event of any appeal from these valuations to the Supreme Court, the Supreme Court shall have practically the same power that is conferred upon the Superior Court; it being provided that in the Supreme Court that court may make its findings

"Unless the same is reversed for error in rejecting evidence properly proffered, in which case the hearing shall be remanded to the Commission with instructions to receive the evidence so proffered."

So that, it is respectfully submitted, with very great deference to the learned Judge who wrote the opinion, that he has fallen into the error of quoting special powers given to the Superior
295 Court and the Supreme Court on hearings as to the valuation of railways and inadvertently applying those powers to other hearings, such as the hearing in the case at bar, which are provided for by other sections of the Act, and to hearings such as were had in the joint wheat rate case, No. 7616, also provided for by other sections of the Act. And we ask leave of the Court to again affirm that in so far as hearings are concerned as to track connections or rate making, joint rate or otherwise, there is no provision in the law for any review of the action of the Commission in receiving or rejecting testimony.

For the taking of testimony by deposition in behalf of the railroads, though Section 14 of the original Act which was not amended by the Act of 1907, does affirmatively provide for the taking of depositions in behalf of and at the instance of the Commission.

For the enforced attendance of witnesses in behalf of the railroad

company where they shall refuse to appear in response to subpœn
or testify, except that the Commission itself shall report the witnes
for court process, and if the Commission shall refuse to so repor
the witness for court process there is no method of reviewing th
action of the Commission thereon.

And again appellant respectfully propounds to the court the ques
tion whether or not judicial remedy has been provided for, wher
the court before whom the review may be had shall not be permitte
to make an original investigation, take testimony, or ascertain facts
but shall be confined to the consideration of that testimony whic
the legislative body itself has taken.

It must be borne in mind that the whole procedure befor
296 the State Commission is contrary to the course of the commo
law. It is a special procedure provided for by the Act
And there would seem to be no reason for reading into the Ac
that which the Act itself does not provide for. Take the cas
of the making of rates as an example, the power as to which i
legislative and not judicial. It is unquestioned doctrine that wha
shall be a reasonable rate in the future is a legislative question
whether a rate in existence is reasonable is a judicial question. Now
in the Superior Court on any review proceedings to review for in
stance some rate order, there is no power whatever in the Court to d
more than determine whether the rate established by the Commis
sion is or is not reasonable. The Court cannot say on such a revie
hearing that some other rate, which the testimony submitted ma
show would be reasonable, shall be put into effect in lieu of tha
proposed by the Commission, for such power of determining futur
rates is a legislative power, and while possibly a right to exercis
this power might be conferred upon the courts—a question not no
here for determination—it is certain that no such power has bee
conferred. It has no power to remand to the Commission fo
further hearing or for a continuation of the old hearing. In othe
words, the Courts of Washington have not been charged with an
quasi legislative duty to say, in the event of any review in thos
courts, that such and such a rate ought to be put into effect instea
of the one ordered by the Commission. And the same thing may b
said as to track connections.

Fourth.

Is the act constitutional because of its excessive penalties withi
the doctrine of ex parte Young (Minnesota-Attorney General Case
28 S. C. Rep., advance sheets p. 441.

In Ex Parte Young it was determined by the Supreme Court o
the United States that State legislation imposing regulation
upon railways which provided such penalties for dis
297 obedience as that obedience without resorting to judicia
proceedings to review becomes practically necessary for th
fear of a confiscation of property which might result from the ac
cumulate penalties pending contest, was void. It was determine
by the Supreme Court in effect that such legislation was a practica
denial of judicial remedy. The learned judge writing the opinio

in this case, while discussing a similar question raised by the appellant in this case, says:

"But as counsel for appellant and respondents both agree that the penalties are not involved in this case, for the reason that the order of the Commission provides for a subsequent order specifying the proportionate amount to be made by each of the railroads of the expense of making such connections, and that such subsequent order has never been made, we will decline to pass upon the question until it is a material issue in a case presented."

The appellant respectfully suggests whether the Court has applied the true test to determine the question of the constitutionality of the law. It is respectfully submitted that the test of constitutionality does not depend upon what has been done under an act, but what may be done.

The order complained of in this case was passed September 20th, 1907. If the Commission has any power under the Act to apportion the expense of track connections or direct by which road the cost of the same shall be borne (a power which is contested because the statute has not provided for it, and for lack of which it has been argued that the power itself to order track connections has never been conferred), then there was nothing to prevent the Commission from immediately entering upon a hearing and making an order touching the expense of track connections, in which event penalties would immediately attach, and approximately as suggested in the main brief filed at the hearing $1,200,000.00 penalties would have accumulated against the O. R. & N. Company, with an approximate like amount against the Northern Pacific and a somewhat less
298 amount against the Spokane & Inland Company up to the time of the decision of this case. These are the consequences flowing from enforcement of the Act. Is an Act, therefore, which imposes such possible penalties valid, since its tendency is to instill into the railroad companies obedience, rather than take the risk of a confiscation of property to that extent by disobedience?

299 Fifth.

If there was no evidence disclosing any business necessity for track connections, or traffic to be subserved thereby, is not the order an arbitrary order and therefore unreasonable and unlawful; and is not the order an unconstitutional invasion of the property rights of the railroads, since if the premise be true that there is no business necessity or traffic conditions to be subserved by the order, a particular use of railroad property has been directed and a devotion of money to make track connections required without reason therefor, which constitutes a taking of property without due process of law?

It was urged in the appellant's brief that all regulation, whether taking the form of the making of rates or, as in this case, the making of track connections, must be reasonable regulation, and that what was reasonable was a judicial question. It was urged that the doctrine of the Jacobson case announced by the Supreme Court of the United States is that a statute or a regulation provided for thereunder is frequently valid or the reverse according as the fact may be

whether it is a reasonable or an unreasonable exercise of legislative power over the subject matter involved. In other words, that there may sometimes be a constitutional statute and an unconstitutional enforcement of the statute. It was said in that case, which was a track connection case, that while the power of regulation exists it is also to be remembered that the Legislature cannot under the guise of regulation interfere with the proper conduct of the business of a railroad in matters which do not fairly belong to the domain of reasonable regulation. The only question arising as each case comes up for decision is whether in the particular case power has been duly exercised.

300 It was argued by the appellant that in the case at bar there was in fact no evidence whatever of any business necessity or traffic conditions calling for track connections at the places where track connections were ordered, and the appellant now respectfully reaffirms this contention, although it is admitted that at Connell there was some evidence indicating that some little traffic might be subserved, though in the opinion of counsel writing this petition and filing the former brief, there could hardly be said to be sufficient evidence to justify track connections at that point. The opinion in this case is silent as to this question. The evidence considered by the court below was certified in the bill of exceptions or statement of facts and has been printed in the appellant's brief and will be found on pages 16 to 65 thereof. This evidence did disclose that track connections at the particular places where track connections were finally ordered were feasible. It does not show that any traffic is to be subserved thereby. If track connections may be ordered without any necessity therefor merely because two roads either cross each other or lie near to each other at the places involved; if no injury to the public need be shown for lack of track connections; if no showing is necessary that business conditions or the movement of traffic would be subserved by track connections, then of course an examination of the evidence is unnecessary, and it is admitted by counsel preparing this petition that there is nothing in the statute affirmatively requiring proof of necessity as a basis for track connections, but counsel respectfully invites the opinion of the Court on this question.

Respectfully submitted,

ZERA SNOW,
Of Counsel for Appellant.

Indorsed: Petition for Rehearing. Filed Mar. 26, 1909. C. S. Reinhart, clerk.

301 In the Supreme Court, State of Washington.

FRIDAY, *June 4th*, 1909.

No. 7613.

STATE ex Rel. OREGON RAILROAD & NAVIGATION COMPANY, Appellant,
vs.
THE RAILROAD COMMISSION OF WASHINGTON, Respondent.

Judgment.

This cause having been heretofore submitted to the Court, upon the transcript of the record of the Superior Court of Thurston County, and upon the argument of counsel, and the court having fully considered the same, and being fully advised in the premises, it is now, on this 4th day of June, A. D. 1909, on motion of John D. Atkinson, Esquire, of counsel for respondent, considered, adjudged and decreed, that the judgment of the said Superior Court be, and the same is, hereby affirmed with costs; the petition for rehearing denied, and that the said Railroad Commission of Washington have and recover of and from the said Oregon Railroad & Navigation Company and from the National Surety Company surety the cost of this action taxed and allowed at Eighty-two Dollars, and that execution issue therefor. And it is further ordered, that this cause be remitted to the said Superior Court for further proceedings, in accordance herewith.

302 In the Supreme Court of the State of Washington.

No. 7613.

STATE OF WASHINGTON ex Rel. OREGON RAILROAD & NAVIGATION COMPANY, Relator, Appellant,
v.
H. A. FAIRCHILD, JOHN C. LAWRENCE, and JESSE S. JONES, as Railroad Commissioners of the State of Washington, Respondents, *Respondents.*

To the Judges of the Supreme Court of the State of Washington:

The appellant herein, the Oregon Railroad & Navigation Company, relator to the writ herein, feeling itself aggrieved by the judgment entered in the above entitled cause against the said appellant on the 4th day of June, 1909, wherein and whereby the appellant, among other things, by the judgment of the said supreme court affirming the judgment of the court below was required to make certain track connections between the lines of railroad of the said appellant and the lines of railroad of other railroad companies, more

particularly in the record of the proceedings in the above cause and the judgment therein entered referred to, now by its attorneys prays for leave to prosecute a writ of error to the Supreme Court of the United States, under and according to the laws of the United States in that behalf made and provided, to the end that the said judgment of the supreme court of the state of Washington may be vacated and set aside, a reversal of which said judgment your petitioner now prays for; and your petitioner now shows that by the said judgment of the supreme court of the state of Washington so as aforesaid entered against your petitioner, a review and reversal of which is sought by the said proposed writ of error, your petitioner has been denied the guaranty and protection provided for by the constitution and laws of the United States, and that by the said judgment of the supreme court of the state of Washington a privilege, right and immunity by your petitioner claimed and urged in the said cause under the constitution and laws of the United States has been by the said judgment of the supreme court of the state of Washington denied to your petitioner, and that a Federal question has
303 been made to appear on the record of the said cause on which the said cause was heard by the said supreme court and the said judgment entered, all of which will be more fully made to appear by an inspection of the record of the said cause and the assignments of error herewith presented, submitted and filed. And your petitioner now prays that an order may be made fixing the amount of security for costs on the said writ of error, and that upon the said writ, due return being made thereto, the said judgment of the supreme court of the state of Washington may be reversed; and your petitioner will ever pray.

W. W. COTTON,
JAS. G. WILSON,
ZERA SNOW,
Attorneys for the Oregon Railroad & Navigation Company.

The Writ of Error prayed for is allowed.

Let the Writ issue accordingly, with security for costs in the sum of $500.00.

FRANK H. RUDKIN,
Chief Justice Supreme Court of State of Washington.

Indorsed: Petition for Writ of Error. Filed Jun- 26, 1909. C. S. Reinhart, Clerk.

304 In the Supreme Court of the State of Washington.

No. 7613.

STATE OF WASHINGTON ex Rel. OREGON RAILROAD & NAVIGATION COMPANY, Relator, Appellant,

v.

H. A. FAIRCHILD, JOHN C. LAWRENCE, and JESSE S. JONES, as Railroad Commissioners of the State of Washington, Respondents, ***Respondents.***

Comes now the Oregon Railroad & Navigation Company, appellant in the above entitled cause and the plaintiff in error to the writ of error now this day prayed for by the petition therefor filed in the above cause and court, and files the following

Assignments of Error

upon which plaintiff in error will rely upon its prosecution of the said writ:

I.

The Act of the State Legislature of the state of Washington creating a Railroad Commission for the said state, and pursuant to which the judgment of the supreme court of the state was entered, is unconstitutional and void in that the said act fails to provide a judicial remedy or appropriate judicial procedure for the review of the orders of the Railroad Commission of Washington, and particularly the order complained of in this cause and by the judgment of the said supreme court the appellant herein has been denied the equal protection of the laws, and its property has been taken without due process of law, contrary to and in violation of the constitution of the United States.

II.

The judgment of the supreme court of the state of Washington sought to be reviewed by the writ of error herein is erroneous
305 and without authority of law, for that by the said judgment the appellant herein was denied the right to offer proof before a court of competent authority as to the reasonableness of the track connections by the judgment of the supreme court of the state affirming the judgment order of the court below ordered and directed to be made, and the evidence offered by the appellant in that behalf in the trial court was rejected and denied to the appellant, whereby and by the judgment of the said supreme court of the state of Washington the appellant has been denied the equal protection of the laws, and the property of the appellant has been taken without compensation and without due process of law, contrary to and in violation of the constitution and laws of the United States.

III.

The Act of the State Legislature of the state of Washington pur porting to confer upon the railroad commission of the said state au thority and power to hear and determine as to track connections t be made by railroads in the state of Washington, and pursuant t which the proceedings in the said cause were had and under whic the said judgment of the supreme court of the state of Washingto was entered, is unconstitutional and void and violates the constitutio of the United States in that the said act by its excessive penalties pro vided for therein is void and the judgment entered in this cause b the supreme court of the state of Washington under the said act re quiring track connections to be made on the part of the appellan is erroneous and void in that the same denies to the appellant th equal protection of the laws, and the judgment constitutes a takin *pro tanto* the appellant's property without compensation and with out due process of law, in violation of the constitution of the Unite States.

IV.

The order of the railroad commission of the state of Washingto requiring and directing the appellant to make the track connection by the said order required, and which order was by the said judg ment of the supreme court of the state of Washington affirmed, wa passed and made without any evidence whatsoever showin
306 or tending to show any necessity for the said track connec tions or either of them, and without any evidence whatsoeve that any public necessity would be served thereby. The said orde so affirmed and directed to be carried into effect by the said judg ment of the supreme court of the state of Washington was wilfu and arbitrary and without reason or necessity therefor, whereby an under the judgment of the said supreme court of the state of Wash ington sought to be reviewed the appellant has been denied the equa protection of the laws, and the property of the appellant taken *pr tanto* in violation of the constitution of the United States, and ther was error in the said judgment accordingly.

V.

There was error in the said judgment of the supreme court o the state of Washington in that the said order of the railroad com mission in respect to the track connections by the said commissio ordered, which was affirmed and directed to be carried out by th said judgment, constitutes an interference with interstate commerc and the means and instrumentalities of interstate commerce, con trary to and in violation of the constitution and laws of the Unite States, and the said judgment sought to be reviewed by the writ o error herein was erroneous accordingly.

VI.

By the judgment of the supreme court of the state of Washing ton this appellant was denied the right of trial and hearing before

court of competent judicial authority touching and respecting the reasonableness, lawfulness and practicability of the track connections by the judgment ordered against the appellant, and thereby the appellant was denied the equal protection of the laws and the property of the appellant taken without due process of law, in violation of the constitution of the United States, and the judgment of the supreme court of the state was erroneous accordingly.

VII.

There was error in the judgment of the supreme court of the state of Washington in that by the record of this cause and by the said judgment the appellant was denied the right to make proof
307 on the subject matter of the track connections by the judgment ordered, and evidence offered by the appellant that the track connections by the judgment directed were impracticable, unreasonable and unlawful was refused by the judgment, whereby and by the ruling and judgment of the supreme court of the state the appellant was denied the equal protection of the laws and the appellant's property taken without due process of law, contrary to and in violation of the constitution of the United States.

W. W. COTTON,
JAS. G. WILSON &
ZERA SNOW,
Attorneys for Oregon Railroad & Navigation Company, Appellant in the Above-Entitled Cause and Plaintiff in Error to the Proposed Writ of Error Applied for.

Indorsed: Assignments of Error on Writ of Error from Supreme Court of United States. Filed Jun- 26, 1909. C. S. Reinhart, Clerk.

308 In the Supreme Court of the State of Washington.

No. 7613.

STATE OF WASHINGTON ex Rel. OREGON RAILROAD AND NAVIGATION COMPANY, Relator and Appellant,
v.
H. A. FAIRCHILD, JOHN C. LAWRENCE, and JESSE S. JONES, as the Railroad Commissioners of the State of Washington, Respondents.

Know all men by these presents, that we, the Oregon Railroad and Navigation Company, as principal, and National Surety Company of New York, as surety, are held and firmly bound unto the respondents above named, H. A. Fairchild, John C. Lawrence and Jesse S. Jones, Railroad Commissioners of the state of Washington, and to their successors in office, in the full and just sum of Five Hundred Dollars to be paid to the said obligees, their attorneys, executors, administrators or assigns, or successors in office, to which

payment, well and truly to be made, we bind ourselves, our administrators and successors, jointly and severally by these presents. Executed and dated this 26th day of June, A. D. 1909.

Whereas, lately at a session of the supreme court of the state of Washington, in the above entitled cause depending in said court between the said Oregon Railroad and Navigation company, the relator and appellant therein, and the said H. A. Fairchild, John C. Lawrence and Jesse Jones, the respondents therein, a judgment was rendered against the said Oregon Railroad and Navigation Company, and the said Oregon Railroad and Navigation Company having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to review the said judgment in the aforesaid suit in the supreme court of the United States, and a citation directed to the said H. A. Fairchild, John C. Lawrence and Jesse S. Jones, Railroad Commissioners, citing and admonishing them to be and appear at a session of the United States supreme court, next hereafter to be holden, having been issued or about to be issued.

Now the condition of the above obligation is such, that if the said Oregon Railroad and Navigation Company will prosecute said
309 writ of error to effect and answer all costs if it shall fail to make the said plea good, then the above obligation to be void, otherwise to remain in full force and virtue.

[SEAL.] THE OREGON RAILROAD AND NAVIGATION COMPANY,
By ZERA SNOW &
W. W. COTTON,
Principals.
NATIONAL SURETY COMPANY,
By JAS. McI. WOOD AND
JACOB T. CANBY, *Sureties,*
Its Attorney- in Fact.

The foregoing bond and penalty thereof are hereby approved.
FRANK H. RUDKIN,
Chief Justice of the Supreme Court of the State of Washington.

Indorsed: Cost Bond on Writ of Error. Filed Jun- 26, 1909. C. S. Reinhart, Clerk.

310 In the Supreme Court of the State of Washington.

No. 7613.

STATE OF WASHINGTON ex Rel. OREGON RAILROAD & NAVIGATION COMPANY, Relator and Appellant,
vs.
THE RAILROAD COMMISSION OF WASHINGTON and H. A. FAIRCHILD, John C. Lawrence and Jesse S. Jones, as Railroad Commissioners of said State, Comprising and Constituting said Commission, Respondents.

Due notice of the intended application of the Oregon Railroad & Navigation Company, appellant in the above entitled cause, to be

made June 26, 1909, for the allowance from the Supreme Court of the United States to the Supreme Court of the State of Washington for a writ of error to review the judgment entered in the above entitled cause, and a demand on the part of the appellant that the Spokane & Inland Railroad Company join in the application for the said writ, joiner for the application of which is hereby refused, is hereby admitted by and in behalf of the Spokane & Inland Railroad Company, and summons and severance for refusal to join in the said writ be and is hereby admitted.

GRAVES, KIZER & GRAVES,
Attorneys for Spokane & Inland Railroad Company.

Dated: June 19, 1909.

Endorsed: No. 7613. In the Supreme Court of the State of Washington, State of Washington ex rel. v. The Railroad Commission of Washington. Summons and Ser-vance as to Spokane & Inland R. R. Co. on Writ of Error. Filed June 26, 1909. C. S. Reinhart, Clerk.

311 In the Supreme Court of the State of Washington.

No. 7613.

STATE OF WASHINGTON ex Rel. OREGON RAILROAD & NAVIGATION COMPANY, Relator and Appellant,

v.

THE RAILROAD COMMISSION OF WASHINGTON and H. A. FAIRCHILD, John C. Lawrence and Jesse S. Jones, as Railroad Commissioners of said State, Comprising and Constituting said Commission, Respondents.

Due notice of the intended application of the Oregon Railroad & Navigation Company, appellant in the above entitled cause, to be made June 26, 1909, for the allowance from the Supreme Court of the United States to the Supreme Court of the State of Washington of a writ of error to review the judgment entered in the above entitled cause, and a demand on the part of the appellant that the Northern Pacific Railway Company join in the application for the said writ, joiner for the application of which is hereby refused, is hereby admitted by and in behalf of the Northern Pacific Railway Company, and summons and severance for refusal to join in the said writ be and is hereby admitted.

GEO. T. REID,
Attorneys for Northern Pacific Railway Company.

Dated: June 19, 1909.

Endorsed: No. 7613. In the Supreme Court of the State of Washington. State of Washington ex rel. v. The Railroad Commission of Washington. Summons and Ser-vance as to N. P. R. R. Co. on Writ of Error. Filed June 26, 1909. C. S. Reinhart, Clerk.

312 The Supreme Court of the United States.

STATE OF WASHINGTON ex Rel. OREGON RAILROAD AND NAVIGATION COMPANY, Relator and Appellant Below, Plaintiff in Error,

v.

H. A. FAIRCHILD, JOHN C. LAWRENCE, and JESSE S. JONES, Railroad Commissioners of the State of Washington, Respondents Below, Defendants in Error.

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Washington, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said Supreme Court of the State of Washington, before you, or some of you, being the highest court of law or equity of the said state in which a decision could be had in the said suit between the Oregon Railroad and Navigation Company, the relator therein and the appellant below, and H. A. Fairchild, John C. Lawrence and Jesse S. Jones, respondents therein, respondents below, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority
313 exercised under, said state, on the ground of their being repugnant to the constitution treaties, or laws of the United States, and the decision was in favor of such, their validity; or wherein was drawn in question the construction of a clause of the constitution, or of a treaty, or statute of, or commission held under, the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said constitution, treaty, statute or commission, a manifest error hath happened, to the great damage of the said Oregon Railroad and Navigation Company, as by its complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, D. C., within sixty days from the date hereof, in the said Supreme Court, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court this 26" day of June, A. D., 1909.

[Seal of the United States Circuit Court.
Western District of Washington.]

A. REEVES AYRES,
Clerk of the Circuit Court of the United
United *States for the Western District*
of Washington, Western Division,
By SAM'L D. BRIDGES, *Deputy.*

The foregoing writ is allowed.
FRANK H. RUDKIN,
Chief Justice of the Supreme Court
of the State of Washington.

314 [Endorsed:] No. 7613. Supreme Court United States. The State ex Rel. Oregon Railroad and Navigation Co., pl'tff in error; vs. H. A. Fairchild et al., railroad commissioners State of Washington. Writ of error. Filed Jun- 26, 1909. C. S. Reinhart, clerk.

315 THE UNITED STATES OF AMERICA, *ss:*

To H. A. Fairchild, John C. Lawrence and Jesse S. Jones, Railroad Commissioners of the State of Washington, Greeting:

Whereas, the Oregon Railroad and Navigation Company has lately sued out a writ of error in the Supreme Court of the United States to the Supreme Court of the State of Washington, to review the judgment heretofore by the said Supreme Court of the State of Washington entered in your favor, in a cause depending therein, wherein the said Oregon Railroad and Navigation Company as relator is appellant, and you the said Fairchild, Lawrence and Jones, Railroad Commissioners, are respondents, and being the judgment of the said Supreme Court by the said court entered on the 4" day of June, 1909, wherein and whereby the said Oregon Railroad and Navigation Company was adjudged and required to make certain track connections between the lines of railroad of the Oregon Railroad and Navigation Company and the lines of railroad of other companies, more particularly in the said judgment and the proceedings and record in the said cause referred to described, and the said Oregon Railroad and Navigation Company having given security required by law you are therefore cited and admonished to be and appear at a session of the Supreme Court of the United States, to be hereafter holden at Washington, D. C., within sixty days from the date hereof, to show cause, if any there be, why the said judgment should not be corrected, and speedy justice done to the parties in that behalf.

Given under my hand at Olympia, Washington, within the District of Washington, this 26" day of June, 1909.

FRANK H. RUDKIN,
Chief Justice of the Supreme Court
of the State of Washington.

316 Due Service of foregoing citation as well as Writ of Error referred to therein as and for Service upon H. A. Fairchild John C. Lawrence and Jesse S. Jones as Rail Road Commissioners of the State of Washington and comprising said Commission is hereby admitted this 26" day of June 1909 and further citation and service upon said parties Defendants in Error to said writ is hereby waived.

W. P. BELL,
Attorney General of the State of Washington, and
W. V. TANNER,
Assistant Attorney General for Said State Attorneys of Record for Said Defendants in Error.
H. A. FAIRCHILD,
JOHN C. LAWRENCE AND
JESSE S. JONES,
As Railroad Commissioners of the State of Washington.

317 [Endorsed:] #7613. In Supreme Court State of Washington. The State ex Rel. O. R. & N. Co. vs. H. A. Fairchild et al., Rail Road Commissioners. Citation & Service on Writ of Error from Supreme Court of U. S. to Supreme Court of Washington. Filed Jun- 26 1909. C. S Reinhart, Clerk.

318 In the Supreme Court of the State of Washington.

No. 7613.

STATE OF WASHINGTON ex Rel. OREGON RAILROAD AND NAVIGATION COMPANY, Relator and Appellant,

v.

THE RAILROAD COMMISSION OF WASHINGTON and H. A. FAIRCHILD, John C. Lawrence, and Jesse S. Jones, as Railroad Commissioners of said State, Comprising and Constituting said Commission, Respondents.

Clerk's Certificate.

I, C. S. Reinhart, Clerk of the Supreme Court of the State of Washington, hereby certify that the above and foregoing is a full, true, and correct transcript of the record in the above entitled cause; and I further certify that, in pursuance of the Writ of Error heretofore filed in this cause, I now herewith transmit the said transcript together with the original Writ of Error and the original Citation to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said Supreme Court at my office in the City of Olympia, this 4th day of August, 1909.

[Seal of the Supreme Court, State of Washington.]

C. S. REINHART,
Clerk of the Supreme Court of the State of Washington,
By F. S. GUYOT, *Deputy.*

319 Supreme Court of the United States, October Term, 1909.

No. 577.

THE STATE OF WASHINGTON ex Rel. OREGON RAILROAD AND NAVIGATION COMPANY, Plaintiff in Error,
vs.
H. A. FAIRCHILD and Others, Railroad Commissioners of the State of Washington, Defendants in Error.

Stipulated that under the Statutes of the State of Washington (Ballinger's Annotated Codes and Statutes of Washington, Sections 6513 and 6514) the briefs on appeal from the judgments of the Superior Court of said State to the Supreme Court of said State filed by the several parties constitute a part of the record on appeal in the Supreme Court of the State and the appellant upon such appeal is required to assign and specify in his brief upon appeal the errors upon which he relies for a reversal; that pursuant to the requirements of said statutes the plaintiff in error above named the Oregon Railroad & Navigation Company as appellant in this action upon the appeal from the judgment of the Superior Court to the Supreme Court of the State filed a brief on appeal containing an assignment or specification of errors which has not been certified or transmitted by the Clerk of the Supreme Court of the State of Washington to the Clerk of this Court as a part of the transcript of record herein;
320 that attached hereto are true copies of certain of the assignments or specifications of error made by the plaintiff in error as aforesaid in its brief on appeal to the Supreme Court of the State of Washington in this action; that the annexed copies of said assignments or specification of error may be filed with the Clerk of this Court and received and printed by said Clerk as a part of the transcript of record in this case.

Dated December 2, 1909.

MAXWELL EVARTS,
Counsel for Plaintiff in Error.
W. P. BELL, *Att'y Gen'l,*
W. V. TANNER,
Ass't Att'y Gen'l,
Counsel for Defendant in Error.

321 *Assignments of Error.*

IV.

The Railroad Commission Law of 1905 and the amendments thereto of 1907 are unconstitutional and violate the Constitution of the United States in that they fail to provide any adequate or efficient judicial or other equivalent remedy in behalf of the owners of railroad property affected by the legislation, to review the lawfulness or reasonableness of the orders of the Railroad Commission regulating the use of such property, and constitute a denial to the owners of

railroad property of the equal protection of the laws and a taking of railroad property and an interference with its use and of the freedom of contract in relation thereto, without compensation and without due process of law; the order of the Commission, therefore, and the judgment of the court below are void and without authority of law.

V.

The court below erred in denying the motion made by the appellant prior to the hearing for leave to introduce evidence at the hearing in supplement to that introduced before the Commission, and likewise erred in refusing the offer made by the appellant at the trial to produce and introduce before the court competent, material and non-cumulative evidence tending to establish the issues made in its behalf, and which tended to show that the order made by the Commission and affirmed by the judgment below was in all
322 respects unjust, illegal and arbitrary, and in refusing the offer made at the trial by the appellant to have witnesses sworn to give testimony to that effect, and in refusing to permit any witnesses to be sworn in behalf of the appellant, and in ruling that under the statutes of the state creating the Railroad Commission and defining its duties and powers no evidence could be introduced before or received by the court at the hearing other than that produced and certified by the Commission, and in ruling that this cause must be heard and determined solely upon the testimony taken by and before the railroad Commission, and by the Commission certified to the court below, by which ruling the appellant was denied the equal protection of the laws and its property taken without due process of law, contrary to the Fourteenth Amendment to the Constitution of the United States, as likewise were such rulings contrary to the Constitution and laws of the state of Washington.

VI.

The order of the Commission complained of was arbitrarily passed without proof or showing that there was any public necessity for, or public convenience to be served by, the track connections ordered, or either of the same; by reason whereof the order of the Commission constituted, and the judgment of the court below constitutes, an interference with interstate commerce, in which the appellant is engaged, and with means and instrumentalities of interstate commerce, in violation of the Constitution and laws of the United States;
323 as likewise, and forasmuch as there was, and is, no evidence of any public necessity for, or public convenience to be served by, the track connections ordered, the said order of the Commission and the judgment of the court below affirming the same constitute a taking of appellant's property and a denial of the equal protection of the laws contrary to the Fourteenth Amendment to the Constitution of the United States; there was error therefore in the judgment accordingly.

XI.

The Railway Commission Law of Washington and the method of enforcement thereof provided by that law, constitute a taking of the appellant's property without compensation and without due process of law, and constitute a denial to the appellant of the equal protection of the laws, in violation of the Constitution of the United States, in that the appellant, in order to avail itself of the pretended remedies in review of the orders of the Commission pretended to be conferred, is compelled to submit to undue and excessive forfeiture and penalties or otherwise be deprived of its property and property rights to obviate the exaction of such penalties.

324 [Endorsed:] Supreme Court of the United States. October Term 1909. No. 577. 21803. The State of Washington ex rel. Oregon Railroad and Navigation Company, Pl'ff in Error, vs. H. A. Fairchild and others, Railroad Commissioners of the State of Washington, Def't in Error. Original. Stipulation as to Transcript of Record. Maxwell Evarts, Counsel for Pl'ff in Error, 120 Broadway, New York City. Office of the Clerk Supreme Court U. S. Received Dec. 22, 1909.

325 [Endorsed:] File No. 21,803. Supreme Court U. S. October Term, 1909. Term No. 577. The State of Washington ex rel. Oregon Railroad & Navigation Company, Pl'ff in Error, vs. H. A. Fairchild et al., Railroad Commissioners. Stipulation of counsel and addition to record. Filed December 22, 1909.

326 Supreme Court of the United States, October Term, 1909.

No. 577.

THE STATE OF WASHINGTON ex Rel. OREGON RAILROAD AND NAVIGATION COMPANY, Plaintiff in Error,

vs.

H. A. FAIRCHILD and Others, Railroad Commissioners of the State of Washington, Defendants in Error.

Stipulated that only the parts of the transcript of record filed herein, hereinafter designated, are material or necessary for the consideration of the errors assigned by the plaintiff in error herein and that the Clerk shall print only the parts of the transcript of record so designated, viz:

	Page of transcript.
Petition for writ of review beginning at	1
Writ of review " "	24
Return and Answer of Commissioners " "	29

and the following papers attached to said return:

Complaint of Railroad Commission beginning at	33
Answer of defendant O. R. & N. Co. " "	63
Reply to answer of O. R. & N. Co. " "	130
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Order of Railroad Commission September 5, 1907, " "	141

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Demand of O. R. & N. Co. to take evidence beginning at	150
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Final Judgment of Superior Court, dated March 5, 1908, entered as of February 19, 1908, beginning at	159
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Stipulation as to Record on Appeal " "	175
Statement of Facts and Bill of Exceptions beginning at	188

including

Statement of Facts beginning at	188
Testimony of A. W. Perley " "	190
" " J. E. Trimball " "	220
" " M. A. Rolfe " "	222
" " E. C. Church " "	226
" " B. E. Palmer " "	257
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Bill of Exceptions " "	265
Judge's certificate " "	271
Exhibit Map of Washington " "	272
Opinion " "	274
Petition for rehearing " "	285
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Citation and service " "	315
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Dated November 19, 1909.

MAXWELL EVARTS,
Counsel for Plaintiff in Error.
W. P. BELL,
W. V. TANNER,
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328 [Endorsed:] Supreme Court of the United States. October Term 1909. No. 577. 21803. The State of Washington ex rel. Oregon Railroad & Navigation Company, Pl'ff in Error, vs. H. A. Fairchild and others Railroad Commissioners of the State of Washington, Deft's in Error. (Original) Stipulation for Diminution of Record. Maxwell Evarts, Counsel for Plaintiff in Error, 120 Broadway, New York. Office of the Clerk Supreme Court U. S. Received Dec. 22, 1909.

329 [Endorsed:] File No. 21,803. Supreme Court U. S. October Term, 1909. Term No. 577. The State of Washington ex rel. Oregon Railroad & Navigation Co., Pl'ff in Error, vs. H. A. Fairchild et al., Railroad Commissioners. Stipulation of counsel as to parts of record to be printed. Filed December 22, 1909.

Endorsed on cover: File No. 21,803. Washington Supreme Court. Term No. 577. The State of Washington ex rel. Oregon Railroad & Navigation Company, plaintiff in error, vs. H. A. Fairchild, John C. Lawrence, and Jesse S. Jones, Railroad Commissioners of the State of Washington. Filed August 21st, 1909. File No. 21,803.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1911.

No. 118.

Supreme Court, U. S.
FILED.
DEC 8 1911
JAMES H. McKENNEY
CLERK

THE STATE OF WASHINGTON EX REL. OREGON RAILROAD AND NAVIGATION COMPANY,
Plaintiff in Error,

vs.

H. A. FAIRCHILD, JOHN C. LAWRENCE and JESSE S. JONES,
Railroad Commissioners of the State of Washington.

IN ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

BRIEF FOR PLAINTIFF IN ERROR.

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THE STATE OF WASHINGTON *ex rel.* OREGON RAILROAD AND NAVIGATION COMPANY, Plaintiff in Error,

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H. A. FAIRCHILD, JOHN C. LAWRENCE and JESSE S. JONES, Railroad Commissioners of the State of Washington.

IN ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

BRIEF FOR PLAINTIFF IN ERROR.

Statement.

This writ of error involves the constitutionality of the Railroad Commission Law of the State of Washington of 1905, as amended in 1907, this question being raised by an answer filed with the Commission and an offer of proof rejected at

the trial; and an unconstitutional application of the Commission Law arising upon the contention made by the plaintiff in error that the evidence at the trial failed to show any reason or necessity for the track connections ordered or that any public interest would be subserved thereby.

So much of the Commission Law of Washington of 1905, as amended in 1907, as is involved in this proceeding, including a provision of the State Constitution, are printed as an Appendix to the brief.

In May, 1907, an omnibus complaint was filed by the Railroad Commission against the plaintiff in error, a steam railroad and an interstate carrier, the Northern Pacific Railway Company, a steam railroad and an interstate carrier, and the Spokane and Inland Railway Company, an electric line and an interstate carrier, complaining among other things of the lack of track connections between their respective lines at various points and places named in eastern Washington.

The complaint was filed under section 6 of the Commission Law (see Appendix, p. XVI.), which provides that all—

> "complaints * * * may be joined in one hearing and no motion shall be en-

tertained against such complaint for misjoinder of complaints or grievances or misjoinder of parties."

The complaint filed involved an inquiry also as to a joint rate on wheat and a joint rate on potatoes to Puget Sound points and a rate on stone from Ilse's Spur (Record, p. 26). Having been served, the plaintiff in error, and other interested roads, appeared before the Commission and answered; the answer of plaintiff in error challenging the constitutionality of the law under which the proceedings were held (Record, pp. 27–46).

Evidence was taken before the Commission, and in September, 1907, an order was made by the Commission, denying the prayer for track connections at Rosalia and Palouse, but ordering them

at *Waverly*, *Thornton* and *Colfax* between the Spokane and Inland Company and the Plaintiff in Error;

at *Connell*, *Farmington* and *Pullman* between the Northern Pacific Company and the Plaintiff in Error;

and at *Oakesdale* and *Garfield* between the Spokane and Inland Company, Northern Pacific

Company and the Plaintiff in Error (Record, p. 55).

It was recited in the findings and order of the Commission that the connections could be made

at *Waverly* at an expense of $1,236.00;
at *Thornton* at an expense of $776.00;
at *Colfax* at an expense of $776.00;
at *Connell* at an expense of $316.00;
at *Farmington* at an expense of $936.00;
at *Oakesdale* at an expense of $892.00;
at *Garfield* at an expense of $616.00;
and at *Pullman* at an expense of $1,460.00.

The order then provided:

> "That said railroads be allowed twenty days from and after the service of this order upon them within which they may agree among themselves at what particular place at each of said points, such connections shall be made, and the manner of apportioning the expense connected therewith, and to notify the Commission of such agreement; and in case of their failure to so agree and file written notice thereof with the Commission, that a supplemental order will be issued by the Commission specifying the particular place where, and the manner in which, such connections shall be made at each of the points above mentioned and the

proportion of the expense to be borne by each of said railroads, parties thereto" (Record, pp. 50–55).

The Chairman of the Commission dissented in part from the order, saying:

"The provisions contained in Section 13, Article 12 of the State Constitution is not in my judgment self executing *Northwestern Warehouse Co.* v. *O. R. & N. Co.*, 32 Wash., 218. The legislature has only authorized the Commission to provide for physical connections of railroads where such connections along the lines of railroad are insufficient to accommodate the public demands. In my judgment, under the evidence in this case, all public necessity would be subserved by compelling physical connections at Oakesdale, Garfield, Colfax and Connell. When such order is made the Commission cannot further exercise the power conferred upon it by the statute for the plain reason that there is no public necessity to justify such action. Considerable expense must be incurred in constructing and maintaining such connections, which must ultimately be paid by the people. No necessity being shown I cannot assent to an order compelling the railroads to incur this additional expense" (Record, p. 54).

In due season and under Section 3 of the Act (see Appendix, p. IX.) the plaintiff in error sued out in the Superior Court of Thurston County, where the hearing before the Commission was had, a Writ of Review to review the order of the Commission, upon which there was certified to that court by the Commission, its record of the hearing, including the evidence taken before the Commission, and which the Commission claimed justified its order. The Bill of Exceptions reserved in the cause, however, recites the following :

> " None of the photographs, maps or plats referred to and identified by the foregoing witness [Church] in the course of his testimony were certified by the Commission to the Superior Court of Thurston County as a part of the evidence taken before the Commission in response to the proceeding in review herein, or otherwise, nor were any of the said maps, plats or photographs returned to said court or filed in connection with the evidence certified and returned by the Commission or otherwise, and none of the said maps, plats or photographs were exhibited to the court in which these proceedings were had, nor were the same in any way referred to or used or considered in connection with

the final decree entered herein" (Record, p. 107).

In the Superior Court the plaintiff-in-error moved for leave to submit evidence upon the issues joined and for a trial *de novo*, claiming that the following clause of Section 3, "the action in review of such order, whether by writ of review, or appeal or otherwise, shall be heard by the court without intervention of a jury, and shall be heard and determined upon the evidence and exhibits introduced before the Commission and certified to by it," was unconstitutional, and constituted a denial to the railroad of the equal protection of the laws and constituted a taking of property of the plaintiff-in-error without due process of law (Record, p. 56), especially in view of the fact that Section 8 of the Act imposed upon the plaintiff-in-error the burden of proving the unreasonableness of the order of the commission (Appendix, p. XXIV).

This motion was denied. By an oversight in printing the Record the order was not printed in the printed record, but a copy appears in the original transcript (See Original Transcript of Record, p. 152).

Thereupon and at the trial the plaintiff-in-error, by competent and non-cumulative testi-

mony, offered evidence touching the track connections ordered by the Commission as follows (Record, p. 57) :

> That to make the track connection at Connell would involve an expenditure of $1,020, and the acquisition by condemnation or otherwise of the right to lay tracks over the right of way of the Northern Pacific Railway Company.
>
> That the track connection at the town of Colfax proposed by the Commission's order was impracticable, but that a track connection at this point was practicable at an expense of $980, but would require the securing of a franchise from the town of Colfax to lay such track over one of the streets of that town.
>
> That the track connection proposed by the Commission at the town of Waverly was not practicable and involved the securing of the right to lay tracks over property not owned by either railroad; but that a practicable track connection could be made at this point at an expense of $5,270, which involved the securing by condemnation or otherwise of rights of way over real property not owned by either road.
>
> That in relation to the track connection proposed by the Commission at the town of

Thornton, it would require the securing of rights of way from the Spokane and Inland Railway Company, and exclusive of the cost thereof, the cost of such track connection would be the sum of $3,960; that the main line of railway of the plaintiff in error and that of the Spokane and Inland Railway Company cross each other at grade at Thornton, and to safeguard the track grade crossing between said lines, an interlocking switch appliance ought to be established, negotiations for which were pending, and that the proposed track connection would interfere with the making possible such interlocking switch appliance; that there was a practicable track connection at said town of Thornton at a place other than that proposed by the Commission, where such track connection could be made at an expense of $3,960, to establish which would require the acquisition of rights of way over real property not owned or controlled by either line.

That to make the track connection ordered by the Commission between the lines of railway of the plaintiff in error and the Northern Pacific Railway Company and the Spokane and Inland Railway Company at the town of Oakesdale, would involve the necessity of laying an additional track in

addition to that proposed by the Commission, without which such track connection between the lines would be impossible, and that the expense of such track connection would be $6,240, and would involve the use between the lines by the one of the other's right of way for such track connection.

That the track connection proposed by the Commission at the town of Farmington was not practicable, but that by an additional track in addition to that so proposed and demanded by the Commission, such track connection could be made at an expense of $3,520, exclusive of rights of way necessary to be acquired therefor, and that a franchise would be necessary to be acquired over a public street of the town of Farmington before any track connections could be made as proposed and demanded by the Commission.

That the track connection proposed by the Commission at the town of Pullman was not practicable, except by the establishment of two additional tracks, the total cost of which, exclusive of rights of way and franchises therefor, would be $3,200, and to make such track connection would require the securing of franchises to lay tracks over the public streets of the town of Pullman.

That to make the track connection at the town of Garfield, as proposed and demanded by the Commission, would require an expenditure of $2,665, exclusive of the cost of right of way therefor, and the use by each line of the other's right of way would be necessary.

That to make any of the track connections directed by the Commission in its order would involve the making of contracts and agreements between the plaintiff in error and the several other companies between whose lines of railway and those of the plaintiff in error the track connections proposed and demanded were ordered.

That no public necessity or convenience would be subserved by either of the proposed track connections demanded and ordered by the Commission.

The court, however, declined to receive the evidence so offered, ruling that under the statute under which the proceeding was being heard, no additional evidence, other than that taken before the Commission could be entertained or received by the court; the plaintiff took exception upon the grounds, that to exclude the evidence offered resulted in a denial to the plaintiff in error of the equal protection of the law, and

that its property would be taken without due process of law, in violation of the Constitution of the United States, and that by the law and Constitution the plaintiff in error was entitled to an additional hearing upon the matters in controversy,—which hearing was denied to it by the exclusion of the evidence offered (Record, pp. 57–60).

Thereupon a judgment was pronounced affirming the order of the Commission, from which an appeal was taken to the Supreme Court of the State of Washington, where the judgment of the Superior Court was affirmed.

Specifications of Error.

The court below erred:

I In not holding that the Act of the Legislature of the State of Washington creating a Railroad Commission for said State, pursuant to which the judgment of the Supreme Court of the State was entered, is unconstitutional and void, in that it fails to provide a judicial remedy or appropriate judicial procedure for the review of the orders of the Railroad Commission of Washington, and particularly the order complained of in this cause; and

that by the judgment of the said Supreme Court the plaintiff in error herein was denied the equal protection of the laws, and its property was taken without due process of law, contrary to and in violation of the Constitution of the United States.

II. In not holding that the judgment of the Supreme Court of the State of Washington sought to be reviewed by the writ of error herein is erroneous and without authority of law, in that the plaintiff in error was denied the right to offer proof before a court of competent authority, as to the reasonableness of or necessity for the track connections ordered by the Commission whereby the plaintiff in error was denied the equal protection of the laws, and its property was thereby taken without compensation and without due process of law, contrary to and in violation of the Constitution of the United States.

III. In not holding that the plaintiff in error was denied the right to offer proof as to the unreasonableness, the unjust discrimination and the insufficiency of the said order of the Commission, whereby the property of the plaintiff in error was taken without due process of law, and in violation of the Constitution of the United States.

IV. In not holding that the Act of the Legislature of the State of Washington is unconstitutional and void in that the said act by the excessive penalties therein provided constitutes a taking *pro tanto* of the property of plaintiff in error without compensation and without due process of law, in violation of the Constitution of the United States.

V. In not holding that the order of the Railroad Commission of the State of Washington requiring and directing the plaintiff in error to make the track connections by the said order required, was made without any evidence whatsoever showing or tending to show any necessity for the said track connections or either of them, and without any evidence whatsoever that any public interest would be served thereby, whereby the plaintiff in error was denied the equal protection of the laws, and its property was taken *pro tanto* in violation of law and of the Constitution of the United States.

ARGUMENT.

I.

The Railroad Commission Law of Washington of 1905, as amended in 1907, and the method of enforcement of the regulation of railroads provided for by that law constitute a taking of the property of the plaintiff in error without due process of law and a denial of the equal protection of the laws because adequate or effective judicial remedies to the owners of railroad property in the State are not provided for the determination of controversies arising upon the question of whether there has been a just and reasonable exercise of the power of regulation.

It was contended in the court below that the Railroad Commission Act did not confer authority upon the Commission to order track connections. It was held by the Supreme Court of the State by its judgment in this case that "from a reading of the whole section [Sec. 3] we are convinced that the legislature intended to confer power upon the Commission to compel the making of physical track connections." It was contended also that the

Act nowhere conferred power upon the Commission to apportion the expense of these track connections nor determine by which road and at whose expense they should be made. The opinion of the court below is silent upon this question; but it will be assumed that given the power, the means of carrying out that power necessarily follow though there is no provision in the law for any hearing to determine these questions. There remains, however, the question whether on a controversy arising by an attempted exercise of the power, the Act provides for an effective judicial review of the action of the Commission—whether the Act—Section 3 of which provides that a writ of review may be issued to the end that the order of the Commission may be reviewed and "its reasonableness and lawfulness inquired into and determined"—confers such power upon a court as will afford the parties a complete judicial hearing. This can be determined only by an analysis of the Act.

Section 3 of the Act provides for the writ, but enacts that—

> "The action in review of such order, whether by writ of review or appeal or

otherwise, shall be heard by the court without intervention of a jury and *shall be heard and determined upon the evidence and exhibits introduced before the Commission and certified to by it.*" (Appendix, p. XIII).

In response to any writ of review which may be issued by the Court, it is provided by Section 8 of the Act as follows :

> SECTION 8. That whenever the Commission under section 3 of this Act has determined any rate, regulation, order, classification or charge in any appeal or writ of review brought by a railroad or express company to determine the reasonableness of such rate, regulation, order, classification or charge, the burden of proof shall be upon said railroad or express company to establish that such rate, regulation, order, classification or charge established by the Commission is unreasonable or unjustly discriminatory or insufficient. (See Section 8, Appendix, p. XXIV).

These are the only sections of the Act conferring power upon the courts over the orders of the Commission, except that in Section 3, the right to appeal to the Supreme Court of the State from the final judgment of the Superior Court is provided for.

It is submitted that the Act does not give to the owners of railway property the same protection which other property owners receive and are entitled to under the law, nor does it give to the Superior Court that power of judicial inquiry which is essentially a part of judicial power. The judicial remedy given (a power to hear and determine, without the power to ascertain the facts upon which the conclusion of the court must rest) is in name merely, and while by Section 8 of the Act the burden is cast upon the owners of railway property to establish that the orders of the Commission are unreasonable, the court is denied the right to take evidence to controvert this burden.

All regulation of the business of common carriers, whether taking the form of a regulation of rates or the making of track connections, must be reasonable, and the question of the reasonableness or unreasonableness of all such attempted regulation is essentially a judicial question, which if not permitted by the law under which it is undertaken, constitutes the taking of property without due process of law and amounts to a denial of the equal protection of the law.

The principle establishing the right of regulation and the limitation of power is well illus-

trated by a long line of authorities of this Court.

In *Railroad Commission Cases*, 116 U. S., 307, the power of regulation was conceded, and a Mississippi statute creating a railroad commission upheld, upon the doctrine that the State had the right to regulate the property of a railway company, as it was engaged in the public service. The court, however, said (p. 331):

> "From what has thus been said, it is not to be inferred that this power of limitation or regulation is itself without limit. This power to regulate is not a power to destroy, and limitation is not the equivalent of confiscation."

In *Chicago, etc., Railway v. Minnesota*, 134 U. S., 418, the principle that regulation has its limits, and that this limitation is that the regulation must be reasonable is fully confirmed; and the doctrine announced in the *Railroad Commission Cases* above quoted is affirmed; in this case also in denouncing as unconstitutional the statute of Minnesota, which as construed by the Supreme Court of that State, forbade judicial inquiry as to the reasonableness of the proposed regulation, it was said, page 457:

> "It [the statute] deprives the company of its right to a judicial investigation, by due

process of law, *under the forms and with the machinery provided by the wisdom of successive ages for the investigation judicially of the truth of a matter in controversy*, and substitutes therefor, as an absolute finalty, the action of a railroad commission which, in view of the powers conceded to it by the State court, cannot be regarded as clothed with judicial functions or possessing the machinery of a court of justice."

The Court again said at page 458:

"The question of the reasonableness of a rate of charge for transportation by a railroad company, involving as it does the element of reasonableness both as regards the company and as regards the public, is eminently a question for judicial investigation, requiring due process of law for its determination. If the company is deprived of the power of charging reasonable rates for the use of its property, and such deprivation takes place in the absence of an investigation by judicial machinery, it is deprived of the lawful use of its property, and thus, in substance and effect, of the property itself."

Mr. Justice MILLER, in a concurring opinion in this case, said, page 460, that:

"The proper, if not the only, mode of judicial relief against the tariff of rates es-

tablished by the Legislature or by its Commission, is by a bill in chancery asserting its unreasonable character. * * *

"But in the present case, where an application is made to the Supreme Court of the State [the application in that case was made to the Supreme Court of the State of Minnesota] to compel the common carriers, namely, the railroad companies, to perform the services which their duty requires them to do for the general public, which is equivalent to establishing by judicial proceeding the reasonableness of the charges fixed by the Commission, I think the court has the same right and duty to inquire into the reasonableness of the tariff of rates established by the Commission *before granting such relief*, that it would have if called upon so to do by a bill in chancery."

In the case at bar the position of the plaintiff in error is analogous to the situation described by Justice MILLER, for while in suing out the writ we were actors, in effect the question before the court below was—as to the reasonableness of the proposed regulation; this question could be determined only by an inquiry as to the facts making necessary the track connections ordered.

In *Chicago &c. Railway v. Wellman*, 143 U. S., 339, this Court, after quoting with ap-

proval the doctrine of the *Railroad Commission cases* and the *Minnesota case* just quoted, said at page 344 :

> " The legislature has power to fix rates and the extent of judicial interference is protection against unreasonable rates."

In *Reagan vs. Farmers' L. & T. Co.*, 154 U. S., 362, the court had under consideration the validity of the Texas Railway Commission Law. The act was upheld as one of the means of the regulation of railways inherent in the State. But in that case the court while declining to pass upon certain of the sections of the statute which were particularly challenged, announced the doctrine contended for in this brief and particularly of the right of a property owner to a judicial inquiry and determination of the reasonableness of proposed statutory regulations affecting his property. The court said, p. 397,

> " It is doubtless true, as a general proposition, that the formation of a tariff of charges for the transportation by a common carrier of persons or property is a legislative or administrative rather than a judicial function. Yet it has always been recognized that if a carrier attempted to charge a ship-

per an unreasonable sum, the courts had jurisdiction to inquire into that matter and to award to the shipper any amount exacted from him in excess of a reasonable rate; and also in a reverse case to render judgment in favor of the carrier for the amount found to be a reasonable charge. The province of the courts is not changed, nor the limit of judicial inquiry altered because the legislature instead of the carrier prescribes the rates. The courts are not authorized to revise or change the body of rates imposed by a Legislature or a Commission; they do not determine whether one rate is preferable to another or what under all circumstances would be fair and reasonable as between the carriers and the shippers; they do not engage in any mere administrative work; but still *there can be no doubt of their power and duty to inquire whether a body of rates prescribed by a legislature or a commission is unjust and unreasonable.*"

And at page 399, after quoting from a long line of decisions of the Supreme Court announcing the same doctrine and distinguishing other cases of the court apparently otherwise, it is said:

"These cases all support the proposition that while it is not the province of the courts

to enter upon the merely administrative duty of framing a tariff of rates for carriage, it is within the scope of judicial power, *and a part of judicial duty*, to restrain anything which in the form of a regulation of rates operates to deny to the owners of property invested in the business of transportation that equal protection which is the constitutional right of all owners of other property. There is nothing new or strange in this. It has always been a part of the judicial function to determine whether the act of one party (whether that party be a single individual, an organized body or the public as a whole) operates to divest the other party of any rights of person or property. * * * This, as has been often observed, is a government of law, and not a government of men, and it must never be forgotten that under such a government, with its constitutional limitations and guarantees, the forms of law and the machinery of government, with all their reach and power, must in their actual workings stop on the hither side of the unnecessary and uncompensated taking or destruction of any private property, legally acquired and legally held. It was, therefore, within the competency of the Circuit Court of the United States for the Western District of Texas, at the instance of the

plaintiff, a citizen of another State, to enter upon an inquiry as to the reasonableness and justice of the rates prescribed by the railroad commission. *Indeed, it was in so doing only exercising a power expressly named in the act creating the commission.*"

The closing clause of this opinion just quoted bears strongly upon another question discussed hereafter, viz., assuming the validity of the statute and that it confers the power undertaken to be exercised by the Commission, there is an express provision that on the proceedings in review in the Superior Court, that court shall enter upon an inquiry as to the "reasonableness and lawfulness" of the orders of the Commission, the vice of the statute being, as is hereafter suggested, that it limits the court in such inquiry to such evidence as the Commission may see fit to take or certify, instead of giving the court a free hand for an investigation of all of the facts.

In *Lake Shore, &c., Railway Co. vs. Smith*, 173 U. S., 684, the court had under consideration the validity of a Michigan statute which required the Lake Shore Railroad to sell mileage tickets in large amounts at a less rate than when a smaller amount of mile-

age was purchased. The statute was declared illegal, because it was held in effect that the regulation was unreasonable since it discriminated between patrons of the road favoring certain individuals at the expense of others. In the course of the opinion in this case the Court also dwelt upon the well established doctrine that because a railway company may in certain instances make physical connection with other lines and interchange, it does not follow that the law can compel this interchange, and it was said at page 697 :

> " It is no answer to the objection to this legislation to say that the company has voluntarily sold thousand-mile tickets good for a year from the time of their sale. What the company may choose voluntarily to do furnishes no criterion for the measurement of the power of a legislature. Persons may voluntarily contract to do what no legislature would have the right to compel them to do."

In *Smyth* vs. *Ames*, 169 U. S., 466, this Court had under review a decree of the United States Circuit Court for the District of Nebraska on a bill there filed to enjoin an order of the Railroad Commission of Nebraska in respect to

a schedule of rates which had been established by the Commission, and the doctrine that regulations which a State makes must be reasonable was again asserted, the Court saying at page 526:

> "While rates for the transportation of persons and property within the limits of a State are primarily for its determination, the question whether they are so unreasonably low as to deprive the carrier of its property without such compensation as the Constitution secures, and therefore without due process of law, *cannot be so conclusively determined by the Legislature of the State or by regulations adopted under its authority, that the matter may not become the subject of judicial inquiry.* * * * The idea that any Legislature, State or Federal, can conclusively determine for the people and for the courts that what it enacts in the form of law, or what it authorizes its agents to do, is consistent with the fundamental law, is in opposition to the theory of our institutions. The duty rests upon all courts, Federal and State, when their jurisdiction is properly invoked, to see to it that no right secured by the supreme law of the land is impaired or destroyed by legislation. This function and duty of the judiciary distinguishes the American system from all other

> systems of government. The perpetuity of our institutions and the liberty which is enjoyed under them depend, in no small degree, upon the power given the judiciary to declare null and void all legislation that is clearly repugnant to the supreme law of the land."

In this case also the jurisdiction of the Federal Court was challenged in respect to its right to review the determination of the State Railroad Commission, upon the ground that under the law of the State ample power was conferred upon the State courts to determine all questions of the reasonableness or unreasonableness of the Commission's order, but upon this question the court said, page 517:

> " 'Whenever a citizen of a State can go into the courts of a State to defend his property against the illegal acts of its officers, a citizen of another State may invoke the jurisdiction of the federal courts to maintain a like defense. A State cannot tie up a citizen of another State, having property rights within its territory invaded by unauthorized acts of its own officers, to suits for redress in its own courts.' "

If the State has no power to prevent a resort

to the federal courts to redress what is claimed to be a wrongful invasion of a property right, it should be equally powerless to prevent in the Federal Court a full examination of the very questions at issue. It is an anomaly in judicial procedure to say that if the litigation proceeds in the State court it must be heard and determined on the evidence taken before the Commission, while if it proceeds in the Federal Court a right to a full investigation of the facts exists.

In *Chicago, Milwaukee, &c. Ry. vs. Tompkins*, 176 U. S., 167, the right of the court to inquire as to the reasonableness of regulations which affect the use of property and which thereby may constitute a taking of property is again affirmed, Justice BREWER saying, page 172:

> "When we recall that, as estimated, over ten thousand millions of dollars are invested in railroad property, the proposition that such a vast amount of property is beyond the protecting clauses of the Constitution, that the owners may be deprived of it by the arbitrary enactment of any Legislature, State or Nation, without any right of appeal to the courts, is one which cannot for a moment be tolerated. Difficult as are the

> questions involved in these cases, burdensome as the labor is which they cast upon the courts, no tribunal can hesitate to respond to the duty of inquiry and protection cast upon it by the Constitution."

In discussing how far the courts may review legislative functions and legislative enactments, this court said (p. 173):

> " It is often said that the Legislature is presumed to act with full knowledge of the facts upon which its legislation is based. This is undoubtedly true, but when it is assumed from that, that its judgment upon those facts is not subject to investigation, the inference is carried too far."

While it is true that the doctrine in the above cases was announced in a discussion of the question of rates, the principle underlying the doctrine is that the making of rates or charges is but a form of regulation, and the doctrine is equally applicable to all other forms of regulation—the making of track connections for instance—since the question is,—" is the proposed regulation reasonable or is it arbitrary without just and meritorious grounds"; and if arbitrary, then the power of the court to interfere exists, the question of reasonableness being pre-eminently a question for the judiciary.

This same doctrine as applied to the making of rates has been applied by this Court when considering the question of a regulation touching the making of track connections.

In *Wisconsin &c., Railroad Co. vs. Jacobson*, 179 U. S., 287, this Court had under consideration the validity of the order of the Railroad Commission of Minnesota directing track connections between two railroads; the order had been declared reasonable and enforcible by the Supreme Court of Minnesota. On writ of error from the Supreme Court of the United States the whole question was reviewed, the ground of review urged being, among other things, the unreasonableness of the regulation. The court, in its opinion, affirmed the general doctrine of the power of regulation, but always with the qualification that this regulation must be a reasonable regulation. This court, in its opinion, said (pp. 296, 297):

> "At common law the courts would be without power to make such an order as was made in this case by the state court. [The judgment in effect affirmed the order of the Commission and in terms defined the track connections to be made.] Legislative authority would be necessary in order to give

power to the courts to render a judgment of this kind. [By the common law there never was any authority for the making of physical track connections either upon the demand of one railroad upon the other or upon the demand of patrons of either.] If power were granted by the Legislature, and it amounted in the particular case simply to a fair, reasonable and appropriate regulation of the business of the corporation, when considered with regard to the interests both of the company and of the public, the legislation would be valid, and would furnish, therefore, ample authority for the courts to enforce it. * * *

" While this power of regulation exists, it is also to be remembered that the Legislature cannot, under the guise of regulation, interfere with the proper conduct of the business of the railroad corporation in matters which do not fairly belong to the domain of reasonable regulation. * * * The only question arising as each case comes up for decision is whether in the particular case the power has been duly exercised."

The court after examining the evidence in the case showing that business convenience, public necessity and trade necessity called for the mak-

ing of the track connections involved in the particular case, said (p. 301):

> "Taking the facts which we have already enumerated into consideration, we think there is no justification furnished for the argument that the judgment, if enforced, would violate any of the constitutional rights of the plaintiff in error. In so deciding we do not at all mean to hold that under no circumstances could a judgment enforcing track connections between two railroad corporations be a violation of the constitutional rights of one or the other, or possibly of both such corporations. It would depend upon the facts surrounding the cases in regard to which the judgment was given. The reasonableness of the judgment with reference to the facts concerning each case must be a material, if not a controlling, factor upon the question of its validity. A statute, or a regulation provided for therein, is frequently valid, or the reverse according, as the fact may be, whether it is a reasonable or an unreasonable exercise of legislative power over the subject matter involved. And in many cases questions of degree are the controlling ones by which to determine the validity, or the reverse, of legislative action. We think this

> case is a reasonable exercise of the power of regulation in favor of the interests and for the accommodation of the public, and that it does not, regard being had to the facts, unduly, unfairly or improperly affect the pecuniary rights or interests of the plaintiff in error. * * * The distinction between this case and that of *Lake Shore, etc., Ry. Co. v. Smith* (173 U. S., *supra*) is plain. There we held that the statute in question was not a reasonable regulation of the business of the company."

In *Louisiana & A. Railway vs. The State*, 85 Ark., 12, the Supreme Court of Arkansas had under consideration the question of the validity of a State statute which had been passed locating and establishing a regular station at Snow Crossing and requiring the railroad company to construct and maintain the same. The question for consideration was whether the Act was unconstitutional as being a bald exercise of arbitrary power, or whether there was a necessity for the crossing—in other words, whether the Act was a reasonable exercise of power of the State or whether an unreasonable exercise of power. The railway company was indicted for failure to comply with the statute and at the

trial filed a plea to the effect that the station was unnecessary, pleading facts showing the lack of necessity. This plea having been stricken from the files, an offer of proof of the same facts was made at the trial under the plea of not guilty. The principle involved was—

> "Whether or not a special act of the Legislature requiring a railroad company to construct and maintain a station at a given point on its line is subject to review by the courts; whether the reasonableness or unreasonableness of such legislation may be presented to the courts for review as a judicial question, or whether the courts are bound to accept as final the determination by the Legislature that there is a public necessity for a station at the place named in the Act and that the requirement upon the railroad company to construct and maintain one there is reasonable." (Opinion, p. 18.)

The court after admitting that upon the precise question involved there was scarcely a precedent, determined under a long line of decisions of the Supreme Court of the United States in respect to rate making, that the plea should have been admitted and the facts suggested by the plea investigated, the court holding in effect that

all regulation of common carriers must be reasonable, saying, page 21:

> "There may be cases where the power is exercised so arbitrarily and unreasonably that the court should declare, as a matter of law, that the Legislature exceeded its power and that the legislative determination should be disregarded. This principle is, we think, clearly recognized by the decisions of the Supreme Court of the United States in the cases involving the validity of legislation directly fixing rates for transportation of passengers and freight [Citing cases].
>
> The application of the principle is necessarily somewhat different in the case of a general rate-making statute from a statute imposing duties like that imposed in this case, but the principle is the same."

Section 3 of the Commission Act of 1905 expressly recognizes the necessity for judicial review of the power exercised by the Commission in ordering any track connection; and provides that "any railroad affected by the order of the Commission and deeming it to be contrary to law may institute proceedings in the Superior Court of the State of Washington in the County in which the hearing before the Commission upon the complaint has been held and have such

order reviewed and its reasonableness and lawfulness inquired into." This power of review so conferred is the judicial remedy which it is understood is necessary to be conferred to render the Commission statute valid. Upon this point, the Supreme Court of Washington in its opinion (Record, p. 118) said:

> "For the purpose of the decision in this case it may be conceded now that the authorities cited by the appellant sustain the propositions contended for by appellant, viz: That use and enjoyment of property are essential attributes to property an interference with which constitutes a taking of property; that railway property impressed with a public use can be regulated whether the regulation take the form of a regulation of rates or of enforced track connections, but that this power of regulation is not unlimited; that all regulation by the State must be just and reasonable, and that the question of the reasonableness or unreasonableness of the regulation is essentially a judicial question, and that the owners of railway property against whom regulation is sought to be enforced have a right to demand from the courts an inquiry as to the validity of this interference and submit to a court as a judicial question all controversies which

may arise as to the lawfulness or reasonableness of the regulation. But an examination of the cases cited convinces us that they have no application to the case at bar, for the reason that the right to a judicial determination of the questions involved in the controversy—the main proposition—is accorded to the appellant in this case by the law of 1907.

"One of the main cases relied upon by the appellant here and also by appellant in case No. 7616, is *Chicago, etc., R. Co. v. Minnesota*, 134 U. S., 418, but that case was decided expressly upon the theory that no judicial determination was permitted. Justice BLATCHFORD, in writing the opinion for the court in that case, said:

"'The construction put upon the statute by the Supreme Court of Minnesota must be accepted by this court, for the purposes of the present case, as conclusive, and not to be re-examined here as to its propriety or accuracy. The supreme court authoritatively declares that it is the expressed intention of the legislature of Minnesota, by the statute, that the rates recommended and published by the commission, if it proceeds in the manner pointed out by the act, are not simply advisory, nor merely *prima facie* equal and reasonable, but final and conclu-

sive as to what are equal and reasonable charges ; that the law neither contemplates nor allows any issue to be made or inquiry to be had as to their equality or reasonableness in fact ; that, under the statute, the rates published by the commission are the only ones that are lawful, and, therefore, in contemplation of law the only ones that are equal and reasonable ; and that, in a proceeding for a mandamus under the statute, there is no fact to traverse, except the violation of law in not complying with the recommendations of the commission. In other words, although the railroad company is forbidden to establish rates that are not equal and reasonable, there is no power in the courts to stay the hands of the commission, if it chooses to establish rates that are unequal and unreasonable'.

"It certainly cannot be contended that our statute could be so construed, for the statute itself especially provides for a review by the superior court, from which court there is an appeal to the supreme court of the State. It is given a review, not only upon the regularity of the proceedings, but upon the merits. It is true that the statute provides that the court shall hear the case only upon the testimony that is taken before the commission ; but it also provides a com-

plete remedy if the commission refuses to accept competent testimony, and if it admits incompetent testimony, of course, the reviewing court would simply disregard it. The supreme court of this State is bound by the testimony which is introduced in the superior court and comes up in the statement of facts, and yet it could not well be said that litigants are deprived in any way of obtaining the judgment of the supreme court on questions which have been litigated in the superior court. The statute provides in so many words that any railroad or express company affected by the order of the commission and deeming it to be contrary to the law may institute proceedings in the superior court of the State of Washington in the county in which the hearing before the commission upon the complaint has been held, and have such order reviewed and its reasonableness and lawfulness inquired into and determined. Time is given to take this review. All the testimony upon which the commission acted is brought before the court, and we are utterly unable to conclude that the question is not finally determined by a judicial arbiter."

A hearing before the Railroad Commission and the review in the Superior Court do not con-

stitute due process of law for the following reasons:

(*a*) The Railroad Commission of the State of Washington is not a court.

(*b*) In the hearing before the Superior Court, section 8 casts upon the railroad company the burden of setting aside the order of the Commission, but the statute requires that such hearing shall be had only on the evidence taken before the Commission and certified by the Commission.

(*c*) Prior to the order of the Commission, the railroad company had practically no knowledge of what the order would be and what proof should be introduced by it.

(*d*) The statute does not provide adequate means whereby the railroad company can obtain and introduce evidence before the Commission.

The Railroad Commission of Washington is not a court endowed with judicial functions and a hearing before the Commission does not constitute due process of law. The Commissioners are not elected as are the judges in the State, but are appointed by the Governor. The Commission does not enforce its own orders, but only by proper suit in a Superior Court can obedience to

orders of the Commission be compelled. It is apparent from the quotation made in the opinion of the Supreme Court of Washington that the Commission is not regarded as a court.

Sections 3, 6, 8, and 14, of the Act are the only sections in which will be found provisions relating to the powers of the Commission or which relate to the procedure before it.

Sections 3 and 6 of the Act provide for hearings before the Commission, outlining the procedure before that body; and provisions are made for review by the Superior Court of the orders of the Commission, direct authority being conferred to have each "order reviewed and its reasonableness and lawfulness inquired into and determined", with a provision that upon this review the Superior Court shall hear and determine the matter on the evidence and exhibits introduced before the Commission and certified to by it in response to the writ.

Section 8 provides that whenever the Commission, under Section 3 of the Act, has made its determination,

> "the burden of proof shall be upon said railroad or express company to establish that such rate, regulation, order, classification or charge established by the Commission is

unreasonable or unjustly discriminatory or insufficient."

This provision clearly indicates that the hearings before the Commission, which are provided for by sections 3 and 6, should be construed as provisional hearings merely and are in their nature advisory to the Commission itself, since no real controversy can be said to have been created as between the Commission representing the public upon the one hand and the railroad companies upon the other, until some final determination has been made by the Commission.

Section 14 provides affirmatively for the right of the Commission to take depositions instead of compelling the attendance of witnesses, but these depositions so to be taken are of witnesses called by the Commission, not by the railroads, section 14 providing:

"SEC. 14. Each witness who shall appear before the Commission by order of the Commission, shall receive for his attendance [here follows provision for his mileage and per diem]. Provided, That no witness shall be entitled to any fees or mileage from the State of Washington when summoned at the instance of the railroad or express companies. The claim by any witness that any

testimony sought to be elicited may tend to criminate the person giving it will not excuse said witness from testifying, but such evidence or testimony shall not be used against such person on the trial of any criminal proceeding, excepting in a prosecution for perjury; Provided, the Commission shall in all cases have the right to take depositions instead of compelling attendance of witnesses (Laws of 1905).

In Subdivision *b* of Section 6 of the Act will be found the only authority for securing the attendance of witnesses. This subdivision provides also that when witnesses refuse to attend before the Commission upon subpœnas served, their attendance may be enforced by a process of the Superior Court, applied for by the Commission, but there are no provisions permitting the railway companies to apply to the court for such compulsory process, and in the event of its refusal to so apply, there is no method for a review of such refusal or other remedy to compel the Commission to apply for the necessary process. Rules of evidence to guide the Commission in taking or receiving testimony are not provided for, nor is there any provision for making the rules of evidence applicable which obtain in

ordinary civil actions, nor is any procedure provided for or order of proof established. There is no provision whatever for any review by the Superior Court of any decision which the Commission may make in the course of its proceedings, either in rejection or receipt of evidence which may be offered, or any review provided for any error in ruling in the course of the examination of witnesses, but the right of the Commission to limit the number of witnesses testifying upon any subject or proceeding to be inquired of before the Commission is expressly provided for.

Since the statute requires that in all review proceedings in the Superior Court of the orders of the Commission, the cause shall be heard and determined upon the evidence which the Commission certifies was received and taken before that body, it lies within the power of the Commission to reject material and competent evidence bearing upon the matters under investigation by it and thus practically prevents any investigation in behalf of the railway companies.

On the review in a Superior Court of the orders of the Commission, the court, while bound by the evidence taken by the Commission, can say only by its final judgment that the order of the

Commission is affirmed or denied; it cannot say, if the investigation be of rates, whether some rate other than that determined by the Commission shall be applied; and if the Commission has erred in receiving or rejecting testimony the case cannot be remanded with instructions to receive the rejected testimony, its sole province being to affirm the order as reasonable or lawful or vacate the order as unreasonable and unlawful.

In fine it may be said:

While the Commission may provide for hearings, process to enforce the attendance of witnesses before the Commission, or to enforce testimony from contumacious witnesses can issue only by the Superior Court, and then only at the instance of the Commission—but not of the railroads.

If process to compel the attendance of a witness is necessary and the Commission should refuse to apply for it, there is no method of reviewing its action.

If evidence is offered by the railways before the Commission and it is rejected, there is no method of review of the action of the Commission.

The Commission may take testimony by deposition—the railroad companies may not.

The Commission has no power to enforce its own orders, but a suit must lie at the instance of the State, and by the Attorney General, under direction of the Commission, to compel obedience to its orders.

Rules of evidence to guide the Commission in taking or receiving testimony are not provided for, nor is any order of proof provided for.

The Commission has power to limit the number of witnesses, and if this power is capriciously exercised, there is no method of review of the action of the Commission.

Certainly an investigation by such a tribunal with such powers, and without " the machinery provided by the wisdom of successive ages for the investigation judicially of the truth of a matter in controversy " cannot be said to afford to the owners of railway property the judicial protection which, by the many decisions of this Court, it has been held they are entitled to in the determination of the question of reasonableness or unreasonableness of the Commission's orders; such a court is a court without rudder or compass.

" I think, therefore," said Mr. Justice BRAD-

LEY in his concurring opinion in *Davidson vs. New Orleans*, 96 U. S., 107,—

> "we are entitled, under the fourteenth amendment, not only to see that there is some process of law, but 'due process of law,' provided by the State law when a citizen is deprived of his property; and that, in judging what is 'due process of law,' respect must be had to the cause and object of the taking, whether under the taxing power, the power of eminent domain, or the power of assessment for local improvements, or none of these; and if found to be suitable or admissible in the special case, it will be adjudged to be 'due process of law'; but if found to be arbitrary, oppressive and unjust, it may be declared to be not 'due process of law.'"

In *Hagar vs. Reclamation District No. 108*, 111 U. S., 708, Mr. Justice BRADLEY'S concurring opinion in *Davidson vs. New Orleans* is quoted with approval.

"Due process of law," said the Court in *Chicago, Burlington and Quincy Railroad vs. Chicago*, 166 U. S., 240, "in each particular case, means such an exertion of the powers of government as the settled maxims of law permit and sanction, and under such safeguards for the pro-

tection of individual rights as those maxims prescribe for the class of cases to which the one in question belongs."

In the opinion of the Supreme Court of the State of Washington in this case (Record, p. 120) a reference was made to section 5 of the Act of 1907 amending section 12 of the Commission Law of 1905, and this section was quoted in the opinion as an authority for the proposition that both the Superior Court and the Supreme Court of the State might, under writ of review proceedings, " make new and correct findings to take the place of such as may not be sustained, unless such findings are set aside and reversed for error on the part of the Commission in rejecting evidence properly proffered, in which case it shall remand such hearing to the Commission, with instructions to receive the evidence so proffered and rejected."

Section 5 of the Act of 1907 amending Section 12 of the Act of 1905 (Session Laws of 1907, p. 545) is printed in full at p. I of the Appendix to this brief. A reading of this section clearly shows that the learned Justice in rendering the opinion in the court below has fallen into the error of applying to hearings of the character of the instant case, the power of the court specifically

conferred in respect to hearings to determine the value of railroad property in the State of Washington. Under Section 12, as amended, the courts undoubtedly have the power indicated in the opinion, but the courts have no such power when review is had under either of sections 3 or 6 of the Act. The powers conferred upon the court under section 12, as amended, are necessary to due process.

That the objections suggested to the Washington statute are not theoretical is shown by the course of proceedings had before the Commission and in the courts below.

The complaint filed by the Commission (Record, p. 14) does not indicate the points or places at which track connections should be made; and before the order of the Commission was entered, the railroad company had no knowledge or information as to the points where connections would be ordered. The Commission Law contemplates that the court by which the writ of review was issued might inquire into and determine the reasonableness as well as the lawfulness of the order, and section 8 provides that the burden of proof shall be upon the railroad company to establish that the order of the Railroad Commission is unreasonable. Without power

to take proof in the Superior Court the defendant railroad company could not respond to such burden. Upon the trial before the Superior Court the defendant offered, as certified to in the Bill of Exceptions (Record, p. 112) "to submit competent and non-cumulative evidence and demanded that the same be received, which if received, would tend to show among other things that there was no necessity for such track connections at either of the points or places as in and by the complaint of the Railroad Commission track connections were prayed for; that no public convenience would be subserved by either of such track connections, and that the lines of travel, trade and traffic were such that the same would not be aided, nor would any business either passenger or freight be subserved by either of such track connections". The defendant railroad company also offered like proof which if admitted would have tended to show that to make either of the track connections demanded involved the enforced making of contracts and agreements between the railways whose lines were affected by the order; that the track connection proposed by the Commission at Pullman was impracticable except by the establishment of additional tracks and the securing

of franchises to lay the tracks over the public streets of the town of Pullman; that the track connection proposed by the Commission at Farmington was impracticable except by an additional track in addition to that proposed, to lay which involved the securing of a franchise over one of the public streets of the town; that the track connection at Colfax proposed by the Commission was impracticable, but that a track connection at this point could be made by securing a franchise from that town to lay the track; and that the track connections at the other places indicated by the Commission called for the securing of rights of way over property not controlled or owned by either railroad between which the track connections were ordered. All of this evidence was material as tending to show whether or not the order of the Commission was "reasonable or lawful."

If the facts so certified could have been shown, then the order of the Commission is arbitrary and such order in and of itself constituted the taking of property of the plaintiff in error without due process. The certificate of the trial judge shows that such evidence was regarded as important and that it was excluded because of the

provisions of section 3. The only testimony at the trial before the Commission tending to show where the points of connection would be established was the evidence of Church (Record, pp. 88–107), and photographs, maps and plats referred to by such witness. These photographs, maps or plats, however, were never in fact certified by the Commission to the Superior Court, nor were they in any way considered by the Court in passing upon its final order. Upon this point, the Superior Court certified in the Bill of Exceptions (Record, p. 107) as follows:

> " None of the photographs, maps or plats referred to and identified by the foregoing witness in the course of his testimony were certified by the Commission to the Superior Court of Thurston County as a part of the evidence taken before the Commission in response to the proceedings in review herein or otherwise, nor were any of the said maps, plats or photographs returned to said court or filed in connection with the evidence certified and returned by the Commission or otherwise, and none of the said maps, plats or photographs were exhibited to the court in which these proceedings were had, nor were the same in any way referred to or used or considered in connection with the final decree entered herein."

It will thus be seen that the Commission failed to make return of very important evidence, which might have aided the court in its determination; nevertheless under section 3, the case must be heard in the Superior Court upon the evidence certified to by the Commission.

If it be the law that the reasonableness or unreasonableness of a regulation of the Commission is a judicial question and if the statute providing for such regulation contemplates a court before which this question may be determined, then it seems to follow that section 3 of the Railroad Commission Act of Washington requiring cases to be heard by the courts only upon evidence taken before the Commission and certified to by it does not provide the necessary judicial review to constitute due process of law.

II.

The Railway Commission Law is unconstitutional because of the excessive penalties which follow a refusal to comply with the Commission's orders, rendering a compliance necessary rather than resort to the courts for a decision as to the validity and reasonableness of the orders of the Commission.

The orders of the Commission take effect of their own force as of the time they are made, whether proceedings to review the orders are instituted or not, and penalties are imposed for disobedience to such orders. These penalties are cumulative pending review proceedings, if a review be taken, so that the railway companies are practically compelled to obey the orders, which may in fact be unlawful and unreasonable, for fear of the accumulation of penalties if they disobey and seek a review of the orders. Such legislation is a denial of the equal protection of the laws and a taking of property without compensation.

Ex parte Young, 209 U. S., 123.

Section 5 of the Act provides that for each day of the continuance of the refusal a penalty at-

taches of $250.00, recoverable by appropriate proceedings therefor in the name of the State. The order in the instant case was made by the Commission on September 5, 1907. A writ of review was promptly sued out and a judgment entered in June, 1909. The Commission's order contemplates the making of track connections at eight different places, involving a possible daily penalty of $2,000 per day, or $60,000 per month, or approximately, between the time of the making of the order and the final judgment of the Supreme Court of the State of Washington, $1,260,000. Before the judgment of this Court is pronounced thereon two years more will have elapsed, making the penalty approximately $2,700,000.

The Supreme Court of Washington in its opinion in this case said (Record, p. 123) :

> "As counsel for appellant and respondents both agree that the penalties are not involved in this case, for the reason that the order of the Commission provides for a subsequent order specifying the proportionate amount to be made [paid] by each of the railroads of the expense of making such connections, and that such subsequent order has never been made, we will decline to pass

upon the question until it is a material issue in a case presented."

It is submitted that the test of constitutionality does not depend upon what has been done under an act, but what may be done ; and had the Commission promptly followed up the order directing track connections with a subsequent order directing by whom and at whose expense the track connections should be made, all of which is possible under the Commission Law, all of the penalties outlined above would have attached ; and indeed it is more than probable that the track connections would have been made rather than to take the risk of the controversy.

III.

There was no public necessity or public convenience to be subserved by the track connections ordered ; the order was an unreasonable and arbitrary exercise of bald power, and as such it constituted a taking of the property of the plaintiff in error without due process of law.

The Chairman of the Commission, in a concurring opinion as to the track connections at

Oakesdale, Garfield, Colfax and Connell, dissented from the findings, which specified that a public necessity was shown for physical connections at Waverly, Thornton, Farmington and Pullman, and stated (Record, p. 54):

> " The legislature has only authorized the Commission to provide for physical connections of railroads where such connections along the lines of railroad are insufficient to accommodate the public demand. In my judgment, under the evidence in this case, all public necessity would be subserved by compelling physical connections at Oakesdale, Garfield, Colfax and Connell. When such order is made the Commission cannot further exercise the power conferred upon it by the statute for the plain reason that there is no public necessity to justify such action. * * * No necessity being shown, I cannot assent to an order compelling the railroads to incur this additional expense."

A railway map is part of the Record, and an examination of it discloses that the lines of transportation of the State have an easterly and westerly trend, extending either to Puget Sound on the West or to Portland on the Southwest. Each of the towns at which track connections

were ordered is supplied with railway transportation either by the Spokane and Inland, Northern Pacific or the lines of the plaintiff-in-error, and through all of them, at least two—and through some of them, three—of the lines run. The great movement of traffic from eastern Washington is either in the direction of Puget Sound, over the Northern Pacific, by a direct westerly haul, or by way of Spokane to Puget Sound, by the Northern Pacific, Spokane and Inland and Great Northern routes, or by the interstate route to Portland in the Southwest.

Centres of trade and traffic grow up in every country. Thornton does not deal with Colfax, or Farmington with Waverly, but each of the places where track connections were ordered, transact their business and interchange their products through central points of trade. The only excuse for track connections is based upon a few questions put to witnesses by Commissioner Lawrence, whose frame of question was substantially this: "Suppose a farmer living at Rosalia on the line of the Northern Pacific desired to ship a carload of household goods to Colfax, at what place should there be track connections in order to enable him to do this;" and the answer very naturally would be,

at "Garfield" if the witness desired the long haul to go to the Northern Pacific, or at "Oakesdale," if the witness desired the long haul to go to the plaintiff in error. And with the exception of some hypothetical questions of the character named and the exception that there was one complaint by stock shippers for lack of track connections at Connell, it is confidently submitted that there is nothing in the Record which indicates that at any point where connections were ordered was there any traffic which would, or could, be subserved by the order.

The census report for 1910 discloses the population of the towns at which track connections were ordered, as follows:

Pullman	2602
Farmington	489
Oakesdale	882
Garfield	932
Waverly	318
Colfax	2783

The reports for Connell and Thornton are not accessible, but approximately the population at those places is respectively 500 and 300.

These towns are all situated in a large wheat growing district and the principal traffic involv-

ing carload shipments is wheat, which finds its way either to Puget Sound or Portland for exportation.

All of the testimony in the case is printed in the Record. Such of it as bears upon the necessity for track connections will be found on pages 75 to 87, inclusive, and 107 to 111.

The following were the only witnesses examined by the Commission: A. W. Perley, J. E. Trimball, M. A. Rolfe and E. C. Church.

In regard to the connection between the line of the plaintiff in error and the Spokane and Inland at Waverly, Mr. Perley (Record, p. 76), testified as follows:

> "Q. Can you suggest, Mr. Perley, where it would be an accommodation to the people along these lines to have a connection between the tracks of the O. R. & N. and the Spokane and Inland at Waverly?
>
> A. No, sir.
>
> Q. There would be no necessity for it?
>
> A. No, sir."

In regard to the connection at Oakesdale, Mr. Perley testified (Record, p. 77) as follows:

> "Q. The next town of importance where the O. R. & N. and the Spokane & Inland cross is Oakesdale. Can you suggest how

the movement of freight would be expedited by having connection between those two lines at Oakesdale?

A. No, I don't think there is any immediate demand for connection between the Inland and O. R. & N. at Oakesdale because the principal towns in Whitman County are reached by the Northern Pacific and Inland."

In regard to the connection at Garfield, Mr. Perley (Record, p. 77) testified as follows:

"Q. Coming down to Garfield, at Garfield the Northern Pacific and O. R. & N. and the Inland meet again?

A. Yes, sir.

Q. Do you think there will be any necessity for connection there at that point?

A. Well, if a man has some household goods to move to Valley Ford how would he get them there or from Elberton?

Q. Well now do you think—you know as a matter of fact that Valley Ford is a town that has just sprung up here lately?

A. Yes.

Q. How many cars of household goods are there pulled from one town to the other?

A. Well I don't know that there are any. I am simply presuming, I don't know of my own knowledge that they have any necessity of connection."

In regard to the connection at Thornton, Mr. Perley (Record, p. 77) testified as follows:

"Q. Coming over on the other branch of the Spokane and Inland we touch the O. R. & N. at Thornton?

A. Yes, sir.

Q. What necessity do you think there would be for connection there?

A. I don't think there would be any necessity for connection at Thornton because the business being done at Thornton is usually transferred at Colfax they have a line from the O. R. & N. from Thornton to Colfax and your line goes to Colfax and your line goes to Garfield and so does the O. R. & N. and both lines go to Spokane.

Q. And it would be almost impossible to make connections at Thornton would it not, both roads coming together on a very heavy grade?

A. At the crossing, yes.

Q. There are heavy grades approaching on the O. R. & N. and also the east?

A. Yes, on both lines."

In regard to the connection at Colfax between the lines of the plaintiff in error and the Spokane & Inland, Mr. Perley testified (Record, p. 78):

"Q. They cross the main line at the foot of a heavy grade do they not?

A. No, not right there.

Q. Well very close to it?

A. Some distance.

Q. So close that if trains got away on the O. R. & N. there would be things happening?

A. Well, trains are not supposed to get away.

Q. But that grade is an extremely heavy grade?

A. Yes, sir. Heaviest on the O. R. & N.

Q. Do you think there would be any purpose served by having connections between the O. R. & N. and the Inland at Colfax?

A. No, I don't think so.

In regard to the connection with the Northern Pacific at Oakesdale, Garfield, Palouse and Rosalia, Mr. Perley (Record, p. 78) testified:

"Q. Now going to the Northern Pacific crossings, would there be any more reason for having connections between the Northern Pacific and Inland lines at Oakesdale than there is with the O. R. & N.?

A. No, I don't think so.

Q. And Garfield, how is that?

A. I don't think there is any necessity there. There are a few points in Whitman County and in eastern Washington that

these two roads do not touch. It seems to me so far as these physical connections at these points are concerned, it would develop very little business in that country.

Q. The same is true of Palouse is it not?

A. Yes, sir.

Q. And besides that it would be very expensive making the connections at Palouse, would it not?

A. I think so, yes.

Q. The Inland is built in there at very heavy expense and the line is not constructed close to the Northern Pacific?

A. No, sir.

Q. At Rosalia the Inland goes over the Northern Pacific does it not?

A. Yes, sir.

Q. And it would be quite expensive there making connections between the two lines.

A. Not near where the depots are.

Q. Do you think there would be any good purpose subserved by making a connection?

A. No, I don't think so.

Q. Just at that point there is a perfect net work of tracks—I mean touching the principal towns there is a perfect net work of tracks between these three roads?

A. Yes, sir.

Q. And you think there would be a good

purpose subserved in making a connection at Rosalia?

A. I think not."

In answer to a question by the Chairman of the Commission, Mr. Perley (Record, p. 79), testified as follows:

"Q. Taking the Whitman County part of it, it is a very rich country down through there, isn't it?

"A. Yes, sir.

"Q. They have connection—I want to ask you if at some of those points down where the three roads cross, like at Oakesdale or Garfield or Palouse, if there was a connection at one of those points with all three of the roads would you think that would accommodate all of the people down there practically as if there was a connection at all the points?

"A. Yes, if there was a connection at some point where the three roads touch in that county, I think that that would be all that would be necessary. I don't know why it would be necessary to have more than one."

Mr. Trimball's testimony is short and is found on pages 84 and 85. The substance of it is found in the following question and answer on page 84.

" Q. How does the lack of physical connection between those points on the two roads affect the movement of traffic ?

" A. Well, I think in order to make it convenient, at least at some point, I should not say that it would be necessary at all points. For instance, in loading cars at some Northern Pacific point you would want to send down to South Idaho you would be handicapped unless you could transfer."

Witness Rolfe (Record, p. 85) testified as follows :

" Q. Do you know, from your observation of the portion of the road there any public purpose that could be subserved by connection between the Northern Pacific and the Spokane & Inland at Oakesdale ?

A. You mean the connection of tracks there ?

Q. Yes, sir.

A. I don't think it would make a bit of difference so they are connected at some point.

Q. A connection at Oakesdale could be of no advantage to anybody that you can conceive of ?

A. I don't know that it would make any difference.

Q. You mean that it would not give any advantage to the public ?

A. No, sir.

Q. And likewise a connection between the Spokane & Inland and the Oregon Railway & Navigation Company, you would answer the same way?

A. If they could make some connections at other points, I do not think it would be of any service."

The testimony of Church (Record, pp. 88–107) related entirely to the feasibility of making track connections at various points. The testimony of Perley, Trimball and Rolfe clearly indicates that all the connections ordered were unnecessary, and such is the finding of the Chairman of the Commission. If the points at which connections were ordered by the Commission are marked in the Railroad Map of Washington (Record, p. 115) it will be seen that the ordering of all the connections in the order was a bald exercise of power by the Commission unsupported by any evidence showing any reason or necessity therefor. If this be true then the order constitutes the taking of property without due process of law.

Wisconsin R. R. Co. vs. Jacobson, 179 U. S., 287.

Louisiana & A. Ry. vs. The State, 85 Ark., 12.

When the question of reasonableness of the regulation of a carrier is up for consideration, the evidence leading up to the regulation must be examined.

C. M. & St. P. Ry. vs. Tompkins, 176 U. S., 167, 172.
Wisconsin R. R. vs. Jacobson, 179 U. S., 287.
Atl. Coast Line vs. N. Car. Commission, 206 U. S., 1.
Louisiana & A. Ry. vs. The State, 85 Ark., 12.

CONCLUSION.

The judgment of the Supreme Court of Washington should be reversed and the order of the Commission should be set aside.

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APPENDIX. †

Section 5 * of the Act of 1907, Amending Section 12 of the Railroad Commission Act of 1905 (Chap. 226, Laws of 1907, p. 545).

SEC. 5. Section 12 of said act shall be amended to read as follows: Sec. 12. The commission shall ascertain as early as practicable the original cost of construction and equipment, the amount expended in permanent improvements and the proportionate amount of such permanent improvements charged to construction, and to operating expenses respectively, the present as compared with the original cost of construction, and the cost of reproducing in its present condition each mile of railway in the State. It

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† The Railroad Commission Act of Washington was passed in 1905 (Sessions Laws 1905, p. 145).

Various sections of this Act were amended in 1907 (Sessions Laws 1907, p. 536).

The proceedings of the Railroad Commission were taken under the law as amended in 1907.

* This section is referred to in the opinion of the Supreme Court of Washington (Record, p. 120) and relates only to proceedings had for the purpose of ascertaining the value of railroad property in the State of Washington and has no relation to other proceedings before the Commission.

shall also ascertain the amount and present market value of the capital stock and funded indebtedness of every railroad line operating in this State. It shall also ascertain the relative value of the use to which each railroad operating in this State is actually put in the carrying of intrastate and interstate business respectively. It shall also ascertain the total market value of the line, equipment and property of each railroad operating in this State used for the public convenience within the State. It shall also ascertain the time intervening between the expenditure of money in the cost of construction and the time when returns in the shape of dividends were first received by each of said railroads. It shall also ascertain the probable earning capacity of each railroad upon intrastate business under the rates now charged by such railroad and the sum required to meet fixed charges and operating expenses on intrastate business on each of said railroads. It shall also ascertain the relative proportion of intrastate and interstate business, the relative proportion of the operating expenses connected therewith, and the relative proportion of the revenue which should be derived therefrom. It shall also ascertain the density of intrastate traffic and the conditions which will

tend to show whether such traffic is likely to continue, increase or diminish. It shall also ascertain the density of population along the line of each railroad within the State; it shall also ascertain the existence of grades, curvatures and other physical conditions affecting the movement of traffic; it shall also ascertain whether the expenditures already made in the construction and equipment of each railroad were such as were justified by the then existing conditions and such as might reasonably be expected in the immediate future; it shall also ascertain whether the money expended by each railroad is reasonable for the present needs of the company and for such as may reasonably be expected in the immediate future; it is however provided that it shall be discretionary with the Commission to ascertain the whole or any part or parts of the matters and things above designated in this section at such time or times and in such order as to them may seem best. The Commission is hereby authorized to cause a hearing or hearings to be held at such time or times and place or places as the Commission may designate for the purpose of ascertaining the matters and things provided for in this section. The Commission shall, before any hearing is had as to any railroad notify

the railroad concerned of the time and place of such hearing by giving at least 30 days' written notice thereof, specifying that at the time and place designated a hearing will be held for the purpose of ascertaining the value of such railroad within this State, which shall be a sufficient complaint to authorize the Commission to inquire into the matters designated in this section as to such railroad. All railroads and express companies concerned shall be entitled to be heard and introduce evidence at such hearing. The evidence introduced at such hearing shall be reduced to writing and certified to by the Commission under its seal of office. The Commission shall make and render findings of fact in writing covering all matters in this section mentioned concerning which it is directed to inquire into, and shall make findings upon all matters concerning which evidence may have been introduced before it which shall tend to show the value of the property used by the railroads or express companies for the public convenience. Any railroad or express company affected by the findings, or any of them, and considering itself aggrieved by the findings of the Commission, or believing such findings, or any

of them, to be contrary to the law or the evidence introduced, or that such findings are unfair, unwarranted or unjust, may institute proceedings in the Superior Court of the State of Washington in the county in which said hearing has been held, or, if held in more than one county, then in the county in which said hearing was commenced, and have such findings, or any of them, reviewed, and their correctness, reasonableness, and lawfulness inquired into and determined. Such review shall be heard by the court without the intervention of a jury and shall be heard upon the evidence and exhibits taken before the Commission and certified to by it; and the court before which such hearing is had, in case it finds any such findings so sought to be reviewed unjust, incorrect, unreasonable, unlawful or not supported by the evidence, shall make new and correct findings to take the place of such as may not be sustained, unless such findings are set aside and reversed for error on the part of the Commission in rejecting evidence properly proffered, in which case it shall remand said hearing to the Commission with instructions to receive the evidence so proffered and rejected and make findings of fact on the evidence so proffered and that already re-

ceived. Said railroad or express company or the Commission shall have the right to appeal or to prosecute by other appropriate proceedings from the Superior Court to the Supreme Court of the State of Washington as in civil cases. In case the Supreme Court finds any findings so sought to be reviewed unjust, incorrect, unlawful or unreasonable, or not supported by the evidence, it shall either make and render proper findings or remand the same to the Superior Court with instructions to make proper findings on the evidence already submitted, unless the same is reversed for error in rejecting evidence properly proffered, in which case the hearing shall be remanded to the Commission with instructions to receive the evidence so proffered and make findings on the evidence so proffered and rejected and that already received. The findings of the Commission so filed, or as the same may be corrected by the courts, when properly certified under the seal of the Commission, shall be admissible in evidence in any proceeding or hearing in which the public and the railroad or express company affected thereby is interested, and such findings, when so introduced, shall be conclusive evidence of the facts stated in such finding or findings as of the date of filing

under conditions then existing, and such facts can only be controverted or contradicted by showing a subsequent change in conditions bearing upon the facts therein determined. The Commission shall also ascertain the amount paid for salaries to the officers of the railroad and express companies and the wages paid employees. For the purpose in this section named the Commission may employ sworn experts to inspect the books, papers, documents, contracts, reports of officers, and agents, and any other documents or copies thereof, in the possession of the railroad or express companies which will tend to show the expenditure of moneys in the cost of construction and equipment or the present value of such property; said information shall be printed from time to time in the annual reports of the Commission; and all railroads now or hereafter constructed shall on demand furnish the Commission profiles of its lines in this State in such form and according to such specifications as the Commission shall direct. Any railroad hereafter constructing any line, extension or siding in this State shall file with the Commission an itemized statement showing the money expended in such construction, extension or siding in such form as the Commis-

sion may prescribe. All railroads doing business in this State shall also furnish the Commission with an itemized statement in such form as the Commission shall prescribe, showing any and all money expended by them in the purchase of equipment, and showing the cost of improvements and betterments in this State.

Section 2 of the Act of 1907 Amending Section 3 of the Railroad Commission Act of 1905 (Chap. 226, Laws of 1907, p. 537).

SEC. 2. Section 3 of said act shall be amended to read as follows:

SEC. 3. That the freight and passenger tariffs, charges for transportation of loaded or empty cars, whether said freight or cars be transported over one line of railroad or over two or more lines of railroad, charges for demurrage and reciprocal demurrage, as hereinafter defined, trackage, railroad connections, sidings, equipment, facilities, train service, waiting rooms for passengers and rooms for freight and baggage at all stations of railroads, and charges for each kind and class of property, money, papers, packages and all other things to be charged for and received by each express company, on all such property, money, papers, packages and things which by the contract to carry are to be transported by said express company, to be demanded, collected, enforced or performed by railroad or express companies shall be just, fair, reasonable and sufficient; and the Railroad Commission of Washington is hereby vested with power and authority, upon complaint made as hereinafter provided or by in-

quiry upon their own motion, after a full hearing, to make any finding declaring any existing rate or absence of rate, joint or otherwise, for the transportation of persons or property, or any regulation whatsoever affecting said rate or charge for transportation of loaded or empty cars, whether the said rate charged be over one line of railroad or over two or more lines of railroad, or demurrage or reciprocal demurrage or the sufficiency of the trackage, railroad connections, sidings, equipment, facilities, train service, and waiting rooms for passengers and rooms for freight and baggage to be unreasonable, or unjustly discriminatory, or insufficient, and to declare and order what shall be a just and reasonable rate, joint or otherwise, practice, rule, regulation or thing to be charged, imposed, enforced or performed or followed in the future in the place of that found to be unreasonable, or unjustly discriminatory or insufficient, and to order that additional trackage or sidings be constructed, and to order that additional equipment and facilities for the movement of passengers and freight be furnished, and that railroad connections be made or to make any finding declaring any existing rate for the transportation of persons or

property, or any classification which has been the subject of inquiry, after notice duly given, to be sufficiently remunerative to the railroad company, or to be reasonable, proper and sufficient, and to order that the same be not changed, altered, abrogated or discontinued, either by changing the rate or classification, without first obtaining the consent of the Commission authorizing such change to be made, and the order of the Commission shall of its own force take effect and become operative twenty days after notice thereof has been given to the railroad or express company affected thereby; which said order shall be served on railroad and express companies by delivery of a certified copy thereof under the seal of the Commission, either to the attorney for the railroad or express company, or the said company itself. Service of said order upon any officer upon whom summons in civil actions might be served shall be sufficient service thereof. And any railroad or express company affected by the order of the Commission and deeming it to be contrary to the law, may institute proceedings in the superior court of the State of Washington in the county in which the hearing before the Commission upon the complaint had been held, and have such order reviewed and its reasonableness

and lawfulness inquired into and determined. Pending such review, if the court having jurisdiction shall be of the opinion that the order or requirement of the Commission is unreasonable, or unlawful, it may suspend the same until the further order of the court pending such litigation, in which event the court shall require a bond of good and sufficient security conditioned that the carrier or carriers petitioning for such review shall answer for all damages caused by the delay in the enforcement of the order of the Commission, and all compensation for whatever sums for transportation service any person or corporation shall be compelled to pay pending the review proceedings, in excess of the sums such person or corporation would have been compelled to pay if the order of said Commission had not been suspended. Said action of review shall be taken by the said railroad or express company within twenty days after notice of said order, and if said action of review is not taken within said time, then in all litigation thereafter arising between the State of Washington and said railroad or express company, or private parties and said railroad or express company, the said order shall be deemed final and conclusive. If, however, said action in

review is instituted within said time, the said railroad or express company shall have the right of appeal or to prosecute by other appropriate proceedings, from the judgment of the superior court to the Supreme Court of the State of Washington, as in civil actions. In all such proceedings, however, bonds shall be required conditioned as hereinbefore provided in addition to the usual appeal bond. *The action in review of such order, whether by writ of review or appeal, or otherwise, shall be heard by the court without intervention of a jury and shall be heard and determined upon the evidence and exhibits introduced before the Commission and certified to by it. No complaint shall at any time be dismissed because of the absence of direct damage to the complainant.*

Section 3 of the Act of 1907, Amending Section 4 of the Railroad Commission Act of 1905 (Chap. 226, Laws of 1907, p. 541).

SEC. 3. Section 4 of said act shall be amended to read as follows:

SEC. 4. That when the rate, fare or charge substituted or established by the Commission, as hereinbefore provided, shall be a joint rate, and the railroad or express companies parties thereto, fail to agree upon the apportionment or division thereof among themselves within 10 days after notice of such order, the Commission may issue a supplemental order, declaring the portion of such joint rate to be received by each railroad or express company party thereto, which shall take effect of its own force as part of the original order, and such supplemental orders shall be subject to review by the said superior court within the time and in the manner hereinbefore provided for the review of original orders of the Commission.

Section 5 of the Railroad Commission Act of 1905 (Laws of 1905, p. 149).

SEC. 5. That if any railroad or express company, or officer, or agent thereof, bound thereby, shall refuse or neglect to obey or perform any order of the Commission mentioned in this act, the Commission may apply by petition to the superior court of this state, in any county in this state, in or through which the said railroad or express company is doing business, to enforce obedience to its order by writ of injunction or other appropriate process, and in addition thereto, the offending party shall, for each day of the continuance of said refusal or neglect, be subject to a penalty of two hundred and fifty dollars, which together with the cost of suit, shall be recoverable by the Commission in an action instituted by it, on the relation of the State of Washington, in the superior court of the State of Washington, in any county in this state, in or through which said railroad or express company runs or does business.

Section 4 of the Act of 1907, amending Section 6 of the Railroad Commission Act of 1905 (Chap. 226, Laws of 1907, p. 541).

SEC. 4. Sec. 6 of said act shall be amended to read as follows:

Sec. 6. When complaint is made to the Commission in writing by any person, firm, corporation, chamber of commerce, board of trade, or any commercial, mercantile, agricultural, or manufacturing society, or any body politic or municipal corporation in this state, that any freight or passenger tariff, rate or charge, or absence of tariff rate or charge, joint or otherwise, for the transportation of passengers, or loaded or empty cars, whether the same be over the line of one railroad company or over the lines of two or more railroad companies, or trackage, railroad connections, sidings, or charge for the storing and handling of freight, rates of charge, for all kinds or classes of property, money, packages, papers, or other things to be charged for and received by each railroad and express company, which by the contract of carriage are to be transported by said railroad or express company between points within this state, is unreasonable

or unjustly discriminatory, or that any train service of railroads, whether freight or passenger, or the amount of trackage, or waiting rooms for passengers, or rooms for freight or baggage at any station, or that cars of same are insufficient or improper, the Commission shall thereupon give to the railroad or express company to be affected thereby, thirty days' written notice of the time and place when and where such complaint will be heard, and said railroad or express company shall be entitled to be heard at such time and place, to the end that justice may be done, and the Commission shall issue process to enforce the attendance of all necessary witnesses. All process herein provided for shall be served as in civil cases; issue shall be made up without delay as nearly as practicable as in civil cases; such complaint shall be instituted in the name of the Commission, and all railroads, express companies and carriers interested shall be made parties to the hearing, and on such hearing all complaints made concerning any rates, or absence of rates, joint or otherwise, charges, tolls, sufficiency of train service, trackage, railway connections, sidings, equipment, or facilities, rules and regulations, or other matters upon which complaints may be founded, may be joined in

one hearing, and no motion shall be entertained against such complaint for mis-joinder of complaints or grievances, or mis-joinder of parties, it being the intention of this act to authorize said Commission to inquire into all grievances whereof complaint may have been made, or by inquiry upon its own motion at one hearing, and by one order and judgment decide and adjust the same, and in any review in the courts of the orders of the Commission the same rule shall apply and pertain with regard to the joinder of complaints and parties as herein provided: *Provided*, All grievances to be inquired into, whether by complaint made to the Commission or by inquiry upon its own motion, shall be set out in the complaint, which shall be served upon the railroad or express company, together with notice of the time and place of hearing.

(*a*) [Here follow provisions for rules and regulations governing the bulletining of trains, etc.].

(*b*) The Chairman, and each of the Commissioners, for the purposes mentioned in this act, shall have power to administer oaths, certify to all official acts, and to issue subpoena for the attendance of witnesses, and the production of papers, way bills, books, accounts, documents and testimony. The superior court of the county

in which any proceeding under this act may be instituted, shall have power to compel the attendance of witnesses, and the production of papers, way bills, books, accounts, documents and testimony as required by said subpoena. The said Commission before which the testimony is to be given or produced, in case of the refusal of any witness to attend, or testify, or produce any papers required by the subpoena, shall report to the superior court in and for the county in which the proceeding is pending by petition, that due notice has been given of the time and place of attendance of said witnesses, or the production of said papers, and that the witness has been summoned in the manner provided in this act, and that the fees and mileage of the witness has been paid or tendered to the witness for his attendance and testimony, and that the witness has failed or refused to attend or produce the papers required by the subpoena, before said Commission, in the cause or proceeding named in the notice and subpoena, and ask an order of said court, compelling the witness to attend and testify before the said Commission. The court upon the petition of the Commission shall enter an order directing the witness to appear before the said court at a time and place to be fixed by

the court in such order, and then and there show cause why he has not responded to said subpoena. A copy of said order shall be served upon said witness. If it shall appear to the court that said subpoena was regularly issued by said Commission, the court shall thereupon enter an order that said witness appear before said Commission at said time and place as fixed in said order, and testify or produce the required papers, and upon failure to obey said order, said witness shall be dealt with as for contempt of court. In all proceedings before the Commission the Commissioners shall have the right in their discretion to limit the number of witnesses testifying upon any subject or proceeding to be inquired of before the Commission.

(*c*) In case the decision or order of the Commission concerning any freight or passenger tariff, rate or charge for the transportation of loaded or empty cars, whether the same be over the line of one railroad company or over the lines of two or more railroad companies, or for demurrage or reciprocal demurrage or charge for the storing or handling of freight, rates of charge for any kind or class of property, money, packages, papers or other things to be charged for or received by any railroad or express company inquired into by the Commission on the written

complaint of any person or number of persons shall be unsatisfactory to any of the persons so making written complaint, upon any matter embraced in such written complaint, such dissatisfied party shall have the right to appeal from the order of the Commission to the superior court of the State of Washington in the county in which the hearing before the Commissioners had been held. Said appeal shall be taken by serving on the Commission or filing with it a notice of appeal specifying the order or portion of the order appealed from within twenty days from the rendition of such decision and the execution and filing within said time of a bond in the sum of one hundred dollars conditioned to pay the costs of such appeal, which bond shall go to the State of Washington. Upon receipt of such notice and bond the Commission shall notify all persons interested in the subject-matter of said appeal being taken. On said appeal the order or portion of order appealed from shall be tried by the superior court without the intervention of the jury and shall be heard and determined upon the evidence and exhibits introduced before the Commission and certified to by it, and the said court shall render such decision concerning the matter complained of as the justice of the case may require.

Section 7 of the Railroad Commission Act of 1905 (Laws of 1905, p. 152).

Sec. 7. In all actions between private parties and railroad or express companies brought under this law, and in all actions for the enforcement of penalties provided for in this act, the rates, charges, classifications, and orders prescribed by the Commission as hereinbefore provided, shall be held conclusive, and deemed and accepted to be fair and just; but in every such action any judgment averse to the railroad or express companies rendered after the Commission has determined the rate, charge, classification or order, and while same is pending on writ of review or appeal, and prior to the final determination of such action under section three of this act, determining the reasonableness of such rate, charge, classification or order, shall be provisional only, and enforcement thereof and process thereunder, shall be stayed pending the final determination of such writ of review or appeal. Upon final determination of such writ of review or appeal, if the judgment therein be in favor of the rate, charge, classification or order prescribed by the Commission, the judgment theretofore provisional shall thereupon become absolute, but

if the determination be against the rate, charge, classification or order, prescribed by the Commission, in such event the judgment theretofore provisional shall be set aside or modified by the court to meet the final determination thereof.

Sections 8, 14, 18 and 26 of the Railroad Commission Act of 1905.

SEC. 8. That whenever the Commission, under section 3 of this act, has determined any rate, regulation, order, classification or charge, in any appeal or writ of review brought by a railroad or express company to determine the reasonableness of such rate, regulation, order, classification or charge, *the burden of proof shall be upon said railroad or express company to establish that such rate, regulation, order, classification or charge, established by the Commission is unreasonable or unjustly discriminatory or insufficient* (Laws 1905, p. 153).

SEC. 14. Each witness who shall appear before the Commission by order of the Commission, shall receive for his attendance three dollars per day and five cents per mile traveled by the nearest practicable route in going and returning from the place of meeting of said Commission; said fees and mileage shall be paid as other accounts, upon the presentation of proper vouchers sworn to by such witnesses and approved by the Chairman of said Commission; *Provided*, That no witness shall be entitled to any fees or mileage from the State of Washington when sum-

moned at the instance of the railroad or express companies. The claim by any witness that any testimony sought to be elicited may tend to criminate the person giving it, shall not excuse said witness from testifying, but such evidence or testimony shall not be used against such person on the trial of any criminal proceeding excepting in a prosecution for perjury; *Provided*, The Commission shall in all cases have the right to take depositions instead of compelling attendance of witnesses and to compel witnesses to attend and testify as upon a hearing before them. The sheriff or constable executing any process issued under the provisions of this act shall receive such compensation as may be allowed by the Commission, not to exceed fees as now prescribed by law for similar services. The said Commission shall have power to subpœna and compel the attendance of witnesses from any place within the State to attend upon said Commission at its meetings at any place in the State. [Laws 1905, p. 156.]

SEC. 18. If any railroad or express company as aforesaid shall willfully violate any other provisions of this act, or shall do any other act herein prohibited, or shall fail or refuse to comply with any and all lawful orders emanating

from said Railroad Commission or any other duty enjoined upon it for which a penalty has not herein been provided, for every such act of violation it shall pay to the State of Washington a penalty of not more than two thousand dollars [Laws 1905, p. 159].

SEC. 26. If any section, subdivision, sentence or clause of this act is for any reason held to be unconstitutional, such decision shall not affect the validity of the remaining portions of the act [Laws 1905, p. 161].

Article 12 of Constitution of the State of Washington.

SEC. 13 *Commo Carriers, Regulation of.*— All railroad, canal, and other transportation companies are declared to be common carriers, and subject to legislative control. Any association or corporation organized for the purpose, under the laws of this state, shall have the right to connect at the state line with railroads of other states. Every railroad company shall have the right with its road whether the same is now constructed or may hereafter be constructed, to intersect, cross, or connect with any other railroad, and when such railroads are of the same or similar gauge they shall, at all crossings and at all points where a railroad shall begin or terminate at or near any other railroad, form proper connections so that the cars of any such railroad companies may be speedily transferred from one railroad to another. All railroad companies shall receive and transport each the other's passengers, tonnage, and cars, without delay or discrimination.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1910.

NO. 311

THE STATE OF WASHINGTON, EX REL. OREGON RAILROAD & NAVIGATION COMPANY, PLAINTIFF IN ERROR,

v.

H. A. FAIRCHILD, JOHN C. LAWRENCE AND JESSE S. JONES, RAILROAD COMMISSIONERS OF THE STATE OF WASHINGTON,
DEFENDANTS IN ERROR.

BRIEF OF DEFENDANTS IN ERROR

W. V. TANNER,
Attorney General for the State of Washington.
Counsel for Defendants in Error.

WALTER P. BELL,
S. H. KELLERAN,
Of Counsel for Defendants in Error.

Olympia, Washington.

STATEMENT OF THE CASE.

This action was instituted in the superior court of Thurston county, Washington, by the Oregon Railroad & Navigation Company, plaintiff in error herein, to review an order of the Railroad Commission of Washington requiring the plaintiff in error to physically connect its tracks with the tracks of certain other railroads at various points in Eastern Washington, the physical connections required being as follows:

At Oakesdale and Garfield, between the Northern Pacific, the Spokane & Inland, and the Oregon Railroad & Navigation Company.

At Connell, Pullman and Farmington, between the Northern Pacific and the Oregon Railroad & Navigation Company.

At Waverly, Thornton and Colfax, between the Oregon Railroad & Navigation Company and the Spokane & Inland.

From a judgment of the superior court of Thurston county refusing to set aside the order of the railroad commission complained of, an appeal was taken to the supreme court of the state, where the decision of the superior court

was affirmed. From the judgment of the supreme court this writ of error was allowed.

Further facts deemed material will be stated in our argument.

The decision of the supreme court of the state is found in 52 Wash., at page 17. This decision should be read in connection with the case of *State ex rel. Great Northern Railway Co. v. Railroad Commission,* found in the same volume, at page 33, inasmuch as these cases together dispose of the objections then made to the railroad commission act.

POINTS AND AUTHORITIES.

The Railroad Commission Law of Washington Does Not Violate the Due Process of Law Clause.

It is contended by plaintiff in error that the railroad commission law of Washington denies the railroads the right to have the orders of the commission reviewed judicially, and is therefore in violation of the provisions of the Fourteenth Amendment. Before taking up the authorities upon this question we desire to review briefly the provisions of the act as construed by the supreme court of the state.

The Washington railroad commission law was originally adopted in 1905 (Laws 1905, ch. 81). Many amendments were made by the legislature of 1907 (Laws 1907, ch. 226), and it was under the act as thus amended that the proceeding now before the court was instituted. (So much of the act as is deemed material or referred to herein is printed in an appendix following this brief.)

The law provides, among other things, for the making of complaints, either by the commission on its own initiative, or by others, respecting rates, facilities, service, etc. (secs. 3 and 6).

When complaint is made, the railroad affected thereby must be given thirty days' written notice of the time and place when and where the complaint will be heard, and the issues are made up without delay as nearly as practicable as in civil cases (sec. 6). All grievances to be inquired into are to be set out in the complaint and the complaint, together with notice of the time and place of hearing, must be served upon the railroad affected (sec. 6). Process is served as in civil cases (sec. 6). The railroad company is entitled to be heard at that time and place, to the end that justice may be done (sec. 6), and there shall be a full hearing (sec. 3). The commission shall issue process to enforce the attendance of all necessary witnesses (sec. 6). The chairman and each of the commissioners shall have power to administer oaths and to issue subpoenas for the attendance of witnesses, and the production of papers, documents and testimony (sec. 6, subd. "b."). If any witness refuses to attend or testify or produce any papers required by the commissioners' subpoena, the commission may report the fact to the superior court, and ask an order of the court compelling the witness to attend and testify. The court may thereupon enter an order to the witness to appear before the court at a time and place fixed to show cause why

he has not responded to the subpoena. If on the hearing it appears to the court that the subpoena was regularly issued, an order shall be entered by the court requiring the witness to appear before the commission as required by the subpoena, and failure to obey said order shall be contempt of court on the part of the witness (sec. 6, subd. "b."). After such notice and full hearing, in which all complainants and the railroad company are made parties, of which they have had due notice, and at which they have a full opportunity to introduce testimony, procuring their witnesses by the subpoena of the commission, its command enforced by the superior court in case of delinquency, the commission is to make its findings and make its order in the premises (sec. 3). Such order does not take effect until twenty days after notice thereof has been given to the railroad company affected thereby, which notice is given by serving a certified copy of the order upon the company (sec. 3). Any company affected by the order of the commission, and deeming it to be contrary to the law, may institute proceedings in the superior court and have such order reviewed, and its reasonableness and lawfulness inquired into and determined (sec. 3). Pending such review, the court, if it be of opinion that the order is unreasonable or unlawful,

may suspend the same pending the litigation, in which event the court shall require a bond conditioned that the company asking the review will answer for all damages caused by the staying of the order and all compensation shippers may be compelled to pay in excess of the rates fixed by the order (sec. 3). If, however, the decision is favorable to the railroad and the complainant appeals, the old rates which the commission has refused to change at the complaint of such shipper are to remain in force and effect, and shippers are required to pay those rates; so that no bond is required of a shipper on his appeal except a cost bond (sec. 6, subd. "c."). In either instance the case in the superior court shall be heard by the court without the intervention of a jury, and shall be heard and determined upon the evidence and exhibits introduced before the commission and certified to by it (sec. 6, subd. "c."). Upon proceedings for review the order of the commissioners is *prima facie* correct; or, as the statute puts it, the burden of proof is upon the railroad company to show that the order is improper (sec. 8).

After the order of the commissioners becomes a finality the attorney general may institute an equitable action in the name of the state in the superior court to procure the enforcement of the

same. If, in such equitable action, the court shall find "that the said defendant has failed without sufficient cause to comply with the order, the court shall decree a mandatory injunction compelling obedience thereto" (sec. 9). Provision is made for the railroad company to petition for modication of any order of the commission whenever surrounding circumstances have changed, and the same appellate or review proceedings are provided for a decision on that order as in original cases (sec. 9).

In the proceeding now before the court plaintiff in error was given the statutory thirty day notice, was served with a copy of the complaint, was represented by counsel at the hearing, procured the attendance of all witnesses which it desired to call in its own behalf, and was given an opportunity to introduce all the evidence which it desired to introduce. Findings of fact were made by the commission and conclusions thereon, and an order entered requiring the physical connections heretofore enumerated. The plaintiff in error prosecuted a writ of review from that order to the superior court of Thurston county. All of the testimony that was taken before the commission was reduced to writing at the time, and was certified by the commission to the superior court upon said review proceeding.

In the superior court plaintiff in error offered some testimony which it claimed was not cumulative, and the superior court refused to receive it. The superior court determined the case upon the evidence taken before the commission, and affirmed the order. The railroad company then prosecuted this appeal to the supreme court of the state, where the judgment of the superior court refusing to set aside the order of the commission was affirmed. Plaintiff in error attacks this procedure, which procedure, as above stated, was in full compliance with the provisions of the railroad commission law.

Does an act which provides for personal notice and service of a copy of the complaint (such complaint to set forth the particular grievance), with full and complete opportunity to appear, introduce witnesses, with compulsory process for their attendance, and a full hearing before a special tribunal, legally constituted by appointment by the governor of the state, subject to the confirmation of the state senate, members under oath and bond, deprive a railroad company, whose facilities are subject thereto, of its property without due process of law, because the provision in the act giving a right of appeal to the state court from an adverse decision of the commission requires the state court to decide the

case upon the evidence adduced before the commission? We think not.

This court has decided unanimously that it is no violation of the Fourteenth Amendment that a state statute permits the property of an individual to be taken from him in an eminent domain proceeding, wherein the value of that property is fixed by a board of commissioners, and the decision of the commissioners upon the question of value is final, leaving open to the court reviewing the proceeding, only the inquiry whether there an erroneous basis was adopted by the tryors in their appraisal or other errors in their proceedings.

Long Island Water Supply Co. v. City of Brooklyn, 166 U. S. 685.

The exact language of the court is as follows:

"It may be true, as contended, that, as construed by the court of appeals, the determination of the commissioners is conclusive as to the mere value of the property, but there is no denial of due process in making the findings of fact by the tryors of fact, whether commissioners or a jury, final as to such facts, and leaving open to the courts simply the inquiry as to whether there was any erroneous basis adopted by the tryors in their appraisal or other errors in their proceedings."

This court has also unanimously decided that a state statute, providing that benefits for street

improvements may be assessed by the city council upon notice to the property owner without any right of appeal to or review by the courts, does not violate the Fourteenth Amendment.

Voigt v. Detroit, 184 U. S. 115.
Goodrich v. Detroit, 184 U. S. 432.

The same question is very fully discussed by the supreme court of Iowa in the case of *Ross v. Board of Supervisors,* 128 Iowa 427; 104 N. W. 506; 1 L. R. A. (N. S.) 431-438, in a case involving the constitutionality of an act of the legislature of Iowa providing for assessment of special benefits for a drainage system. Because the language of the court is so apt at this point of the discussion we take the liberty of quoting it in full:

"The constitutionality of the act is further questioned because, by Code, sec. 1947, which allows an appeal from the assessment made by the board of supervisors, it is also provided that, upon the trial of the appeal, it shall not be competent for the owner to show that his land received no benefits from the improvement. Counsel seem to contend that the land owner is thus cut off from all opportunity to be heard on the question whether his land receives any benefit by reason of the ditch for the construction of which he is taxed. But, as noted in the concluding part of the preceding paragraph, this is a mistake. The landowner is given opportunity to appear before the board of supervisors, which

body is authorized to try all such objections, and, if it be found that any tract of land reported by the commissioners is not in fact benefited by the improvement, it may be relieved from the burden. The effect of the restrictive clause in Code, sec. 1947, is to deny the right of appeal from this finding of the board of supervisors, and confine all further review to the question whether the appellant's land has been assessed in equal and fair proportion, as compared with other property embraced in the district. That a statute making the finding of the board conclusive upon the question whether a given tract of land is properly included in the benefited district, and denying appeal therefrom, is not an unconstitutional deprivation of property without due process of law, is a rule which has been affirmed by the great weight, if not the universal current of authority. The right to an appeal from one court or tribunal to another has never been held to be in itself a denial of due process of law. The power to make a final determination beyond which there is no appeal must rest somewhere, and, in the absence of express or clearly implied constitutional limitations upon its authority in this respect, the legislature may confide that power in any given proceeding to any court, board or commission. Of course, the tribunal thus designated must observe due process of law —that is, the party must be given notice and have opportunity to be heard; but, if the finding be against him, no constitutional guaranty is violated by denying him the right of appeal. Such is clearly the doctrine of our cases." (Citing numerous cases.) "'Due process of law' does not necessarily imply judicial procedure in a court of record or right of trial by jury."

In *Fallbrook Irrigation District v. Bradley,* 164 U. S. 112, this court held that an act of the legislature of California, providing that the special benefits of an irrigation scheme should be assessed by the board of directors of the district upon the property benefited, and that upon the question of fact as to benefits, decided by the board, their decision should be conclusive, was not violative of the Fourteenth Amendment, the court saying:

"Whether a review is or is not given upon any of these questions of fact (if the tribunal created by the state has power to decide them, and if an opportunity for a hearing were given by the act) is a mere question of legislative discretion. It is not constitutionally necessary in such cases to give a rehearing or an appeal."

It has been time and again held that "due process" is not necessarily judicial process.

Reetz v. Michigan, 188 U. S. 505;

Public Clearing House v. Coyne, 194 U. S. 497;

United States v. Ju Toy, 198 U. S. 253;

Murray's Lessee v. Hoboken &c. Co., 18 How. 272.

Nor is the right of appeal essential to due process of law.

Reetz v. Michigan, 188 U. S. 505;

Andrews v. Swartz, 156 U. S. 272.

It must be conceded that the state legislature cannot deny the right of review altogether. This concession narrows the point down to the question whether the judicial review, provided by the act in question, is such as to deprive the plaintiff in error of its property without due process of law.

At the threshhold lies the established doctrine that the state legislature could not, if it would, deny to a railroad company access to the federal courts to set aside, by injunction or other appropriate procedure, a schedule of rates or a requirement of service or facilities, which were so low, or otherwise so unreasonable, as to amount to confiscation of the property of the railroad.

Smyth v. Ames, 169 U. S. 466;

Reagan v. Farmer's Loan & Trust Co., 154 U. S. 362.

In this connection, the court should notice that the Washington act does not undertake to deprive the federal courts of jurisdiction. It is true that if relief were sought in the federal courts, the right of the court to review the order of the commission would be limited to an inquiry as to whether the rates were so low as to amount to confiscation.

St. Louis, S. F. R. R. Co. v. Gill, 156 U. S. 649;

Covington & L. Co. v. Sandford, 164 U. S. 578;

San Diego Land & Town Co. v. National City, 174 U. S. 739.

On the other hand, in the court review proceeding prescribed in the act, the question involved is the "reasonabless and lawfulness" of the order of the commission, and it is not limited to its reasonableness in a constitutional sense. The carrier, then, has a broader right of review, by availing itself of the review proceeding of the act, than by applying to the federal courts for relief.

This court has never attempted to define the sort of judicial review which will satisfy the requirements of the Fourteenth Amendment. Plaintiff in error relies upon the case of *Chicago, Milwaukee & St. Paul Railway Co. v. Minnesota,* 134 U. S. 418, but the Minnesota act there under consideration was held invalid for the reason that it undertook to make the determination of the commission conclusive, and, as construed by the supreme court of the state of Minnesota, intentionally denied any recourse whatsoever to the courts. That the decision is not an authority in this case is plainly seen from the following quotation taken from the opinion:

"No hearing is provided for; no summons or notice to the company before the commission has

found what it is to find, and declared what it is to declare; no opportunity provided for the company to introduce witnesses before the commission,—in fact, nothing which has the semblance of due process of law; and although, in the present case, it appears that, prior to the decision of the commission, the company appeared before it by its agent, and the commission investigated the rates charged by the company for transporting milk, yet it does not appear what the character of the investigation was, nor how the result was arrived at."

Of the decision of the Minnesota case this court in *San Diego Town & Land Co. v. National City* (174 U. S. 739) *supra*, said:

"The supreme court of the state held that it was intended by the statute to make the action of the commission final and conclusive as to rates, and that the railroad companies were not at liberty, in any form or at any time, to question them as being illegal or unreasonable. * * * If the company is deprived of the power of charging reasonable rates for the use of its property, and such deprivation takes place in the absence of an investigation by judicial machinery, it is deprived of the lawful use of its property, and thus, in substance and effect, of the property itself, without due process of law, and in violation of the Constitution of the United States. * * * Observe that this court based its interpretation of the statute of Minnesota upon the construction given to it by the supreme court of that state. What this court said about the Minnesota statute can have no application to the present case, unless it be made to appear that the constitution and

laws of California invest the municipal authorities of that state with power to fix water rates arbitrarily, without investigation, and without permitting the corporations or persons affected thereby to make any showing ast o rates to be exacted, or to be heard at any time or in any way upon the subject."

The language of the supreme court of Minnsota in the case, 38 Minn. 281; 37 N. W. 788, was:

"It seems to us that, if language means anything, it is perfectly evident that the expressed intention of the legislature is that the rates recommended and published by the commission (assuming that they have proceeded in the manner pointed out by the act) should not be simply advisory, nor merely *prima facie* equal and reasonable, but final and conclusive as to what are lawful or equal and reasonable charges; that, in proceedings to compel compliance with the rates thus published, the law neither contemplates nor allows any issue to be made or inquiry had as to their equality and reasonableness in fact."

So the supreme court of Minnesota had held that the statute precluded any judicial review of the determination of the commission.

Therefore, in order to determine the question as to whether the judicial review provided by the act in question satisfies the requirements of the Fourteenth Amendment, it will be necessary to review the definitions of the term "due process of law" as used in that amendment, and we confidently submit that, after a consideration of

those expressions of the courts, the court will not hesitate to conclude that the act in question has not deprived and will not deprive the plaintiff in error of its property without due process of law.

Mr. Justice Bradley's definition, in his concurring opinion in *Davidson v. New Orleans,* 96 U. S. 107, has been repeatedly quoted with approval by this court in later cases. He said:

"I think, therefore, we are entitled, under the Fourteenth Amendment, not only to see that there is some process of law, but 'due process of law,' provided by the state law when a citizen is deprived of his property; and that, in judging what is 'due process of law,' respect must be had to the cause and object of the taking, whether under the taxing power, the power of eminent domain, or the power of assessment for local improvements, or none of these; and if found to be suitable or admissible in the special case, it will be adjudged to be 'due process of law;' but if found to be arbitrary, oppressive and unjust, it may be declared to be not 'due process of law.' Such an examination may be made without interfering with that large discretion which every legislative power has of making wide modification in the forms of procedure in each case, according as the laws, habits, customs and preferences of the people of the particular state may require."

In *Brown v. New Jersey,* 175 U. S. 172, Mr. Justice Brewer said:

"The state is not tied down by any provision of the federal constitution to the practice and procedure which existed at the common law.

Subject to the limitations heretofore named, it may avail itself of the wisdow gathered by the experience of the century to make such changes as may be necessary."

The limitations to which he referred he had previously stated to be that the procedure "must not work a denial of fundamental rights or conflict with specific and applicable provisions of the federal constitution." He then proceeded to quote the language of Mr. Justice Matthews in *Hurtado v. California,* 110 U. S. 516-537:

"It follows that any legal proceeding, enforced by public authority, whether sanctioned by age and custom, or newly devised in the discretion of the legislative power, in furtherance of the general public good, which regards and preserves these principles of liberty and justice, must be held to be due process of law."

In *Hurtado v. California,* 110 U. S. 516, the same contention was made as in the case at bar. It was there urged that since procedure by information, instead of by indictment by a grand jury as at common law, was unknown to the common or statute law of England before the emigration of our ancestors, such procedure was not due process of law. In disposing of this question Mr. Justice Matthews, referring to certain language used in *Murray v. Land &c. Co., supra,* said (p. 538):

"This, it is argued, furnishes an indispensable test of what constitutes 'due process of law;'

that any proceeding otherwise authorized by law, which is not thus sanctioned by usage, or which supersedes and displaces one that is, cannot be regarded as due process of law."

"But this inference is unwarranted. The real syllabus of the passage quoted is, that a process of law, which is not otherwise forbidden, must be taken to be due process of law, if it can show the sanction of settled usage both in England and in this country; but it by no means follows, that nothing else can be due process of law. The point in the case cited arose in reference to a summary proceeding, questioned on that account, as not due process of law. The answer was: however exceptional it may be, as tested by definitions and principles of ordinary procedure, nevertheless, this, in substance, has been immemorially the actual law of the land, and, therefore, is due process of law. But to hold that such a characteristic is essential to due process of law, would be to deny every quality of the law but its age, and to render it incapable of progress or improvement. It would be to stamp upon our jurisprudence the unchangeableness attributed to the laws of the Medes and Persians."

Further (p. 530):

"It is more consonant to the true philosophy of our historical legal institutions to say that the spirit of personal liberty and individual right, which they embodied, was preserved and developed by a progressive growth and wise adaption to new circumstances and situations of the forms and processes found fit to give, from time to time, new expression and greater effect to modern ideas of self-government."

Mr. Justice White, speaking for a unanimous court in *Louisville &c. R. R. Co. v. Schmidt,* 177 U. S. 230-236, said:

"It is no longer open to contention that the due process clause of the Fourteenth Amendment to the Constitution of the United States does not control mere forms of procedure in state courts or regulate practice therein. All its requirements are complied with, provided, in the proceedings which are claimed not to have been due process of law, the person condemned has had sufficient notice and adequate opportunity has been afforded him to defend."

The same justice, speaking again for a unanimous court, in the case of *Iowa Central R. R. Co. v. Iowa,* 160 U. S. 389-393, said:

"But it is clear that the Fourteenth Amendment in no way undertakes to control the power of a state to determine by what process legal rights may be asserted or legal obligations be enforced, provided the method of procedure adopted for these purposes gives reasonable notice and affords fair opportunity to be heard before the issues are decided. This being the case, it was obviously not a right, privilege or immunity of a citizen of the United States to have a controversy in the state court prosecuted or determined by one form of action, instead of by another. It is also equally evident, provided the form sanctioned by the state law gives notice and affords an opportunity to be heard, that the mere question of whether it was by a motion or ordinary action in no way rendered the proceeding not 'due process of law,' within the constitutional meaning of those words."

In *New York & N. E. Ry. Co. v. Bristol*, 151 U. S. 556, the unanimous opinion of this court was expressed by Mr. Justice Fuller, from which we quote (p. 571):

"The conclusions of this court have been repeatedly announced, to the effect that though railroad corporations are private corporations, as distinguished from those created for municipal and governmental purposes, their uses are public, and they are invested with the right of eminent domain, only to be exercised for public purposes; that therefore they are subject to legislative control in all respects necessary to protect the public against danger, injustice and oppression; that the state has power to exercise this control through boards of commissioners; that there is no unjust discrimination, and no denial of the equal protection of the laws, in regulations applicable to all railroad corporations alike; nor is there necessarily such denial, nor an infringement of the obligation of contracts, in the imposition upon them, in particular instances, of the entire expense of the performance of acts required in the public interest, in the exercise of legislative discretion; *nor are they thereby deprived of property without due process of law, by statutes under which the result is ascertained in a mode suited to the nature of the case, and not merely arbitrary and capricious; and that the adjudication of the highest court of a state that, in such particulars, a law enacted in the exercise of the police power of the state, is valid, will not be reversed by this court on the ground of an infraction of the Constitution of the United States.*" (Italics ours.)

This court, speaking by Mr. Justice Gray, in *Capital Traction Co. v. Hof*, 174 U. S. 1, said:

"The legislature, in distributing the judicial power between courts of record, on the one hand, and justices of the peace or other subordinate magistrates, on the other, with a view to prevent unnecessary delay and unreasonable expense, must have a considerable discretion, whenever, in its opinion, because of general increase in litigation or other change of circumstances, the interest and convenience of the public require it, to enlarge within reasonable bounds the pecuniary amounts of the classes of claims entrusted in the first instance to the decision of justices of the peace, provided, always, the right of trial by jury is not taken away in any case in which it is secured by the constitution."

Mr. Justice Field, in delivering the decision of this court in *Hager v. Reclamation District*, 111 U. S. 701-708, said:

"It is sufficient to observe here that by due process is meant one which, following the forms of law, is appropriate to the case and just to the parties to be affected. It must be pursued in the ordinary mode prescribed by the law; it must be adapted to the end to be attained; and, whenever it is necessary for the protection of the parties, it must give them an opportunity to be heard respecting the justice of the judgment sought."

In the case of *Twining v. New Jersey*, 211 U. S. 77, this court speaking through Mr. Justice

Moody, with reference to the Fourteenth Amendment, says (pp. 98-100):

"This court has always declined to give a comprehensive definition of it, and has preferred that its full meaning should be gradually ascertained by the process of inclusion and exclusion in the course of decisions of cases as they arise. * * * From the consideration of the meaning of the words in the light of their historical origin this court has drawn the following conclusions: * * *"

"Second. It does not follow, however, that a procedure settled in English law at the time of the emigration, and brought to this country and practiced by our ancestors, is an essential element of due process of law. If that were so, the procedure of the first half of the seventeenth century would be fastened upon the American jurisprudence like a straight jacket, only to be unloosed by constitutional amendment. That, said Justice Matthews, in the case *Hurtado v. California*, 110 U. S. 516, 529, 'would be to deny every quality of the law but its age, and to render it incapable of progress or improvement.'"

The language of Judge Dunbar, to our minds, is so pertinent to this point that we cannot refrain from quoting briefly from the decision in the supreme court of the State of Washington (52 Wash. 31):

"It is true that the forms of law and procedure under which this commission is acting are not in all respects like the forms and procedure governing other courts, and in the language of many of the cases cited by the counsel for ap-

pellant and repeated by the appellants themselves in their arguments, in some respects 'it is not a proceeding under the forms and with the machinery provided by the wisdom of successive ages,' but it occurs to us that it makes no difference whether it is a proceeding under the forms and with the machinery provided by the wisdom of successive ages, or whether it is under the powers and proceedings provided by this age. Law is a progressive science and must necessarily regard the changing conditions of society and of the business of the country, and the legislature and courts of today ought certainly to be as well qualified to provide machinery for the guidance of a commission as was the lawmaking power two hundred years ago. * * * The essential idea does not take cognizance of the antiquity of the powers and machinery under which the commission is acting, but of the question whether, under such powers and the working of such machinery, the respective legal rights of the carriers and the people are preserved."

It is respectfully submitted that the act in question falls clearly within the principles announced by this court. Obviously the object of the legislature was to require the railroad companies to present their evidence to the railroad commission so that that tribunal may have the benefit of a full hearing. The commission is thereby enabled to render its decision upon a complete presentation of all the facts. The saving in both time and expense resultant from this system alone justifies its adoption. The railroad

companies under such a system must necessarily produce their testimony before the commission. The testimony will there be preserved in written form and in the review proceeding the time of taking the testimony will be saved, and the expense of transcribing and preserving the same need not again be incurred.

Under the interstate commerce act, and under the railroad commission acts passed in many of the states the commissions have not had the advantage of the railroad companies' side of the question. That was reserved for the courts. In fact, in the case of the interstate commerce commission this practice has received the condemnation of this court. The result in most cases was that the findings of the commission were not advisedly made, were set aside by the courts, and had to be referred again to the commissions, and on each occasion the railroad company would reserve its case for the courts. Under the Washington statute the railroad commission has the advantage of all of the facts and arguments which the railroad company can bring before it. When the judicial review is had the same facts are before the court. Under the old system when a matter was brought before the court it was almost invariably referred to a master or referee to take the testimony and came before

the court on testimony taken before a subordinate officer. We submit that the Washington statute accomplishes the same thing in another form.

This court has sanctioned the practice of the lower courts in respect to a reference for the purpose of taking testimony. In *Chicago, Milwaukee & St. Paul Railroad Co. v. Tompkins,* 176 U. S. 167, in reversing and remanding for retrial a case involving the reasonableness of railroad rates, the court directed that the matter be referred by the lower court to a master.

In *Smyth v. Ames,* 169 U. S. 466, speaking of the fixing of railroad rates, the court said:

"Undoubtedly that question could be more easily determined by a commission composed of persons whose special skill, observation and experience qualifies them to so handle great problems of transportation as to do justice both to the public and to those whose money has been used to construct and maintain highways for the convenience and benefit of the people."

Again, in *East Tennessee &c. R. R. Co. v. Interstate Commerce Commission,* 181 U. S. 1, the following language is used:

"To state these issues is to at once demonstrate that their decision as a matter of first impression properly belongs to the commission, since upon that body the law expressly imposed the duty of considering them. Whilst the court has in the discharge of its duty been at times con-

strained to correct erroneous constructions which have been put by the commission upon the statute, it has steadily refused because of the fact just stated to assume to exert its original judgment on the facts, where under the statute it was entitled before approaching the facts to the aid which must necessarily be afforded by the previous enlightened judgment of the commission upon such subjects."

The language of the court in *Cincinnati etc. Railway Co. v. Interstate Commerce Commission,* 162 U. S. 184, is pertinent at this point:

"We think this a proper occasion to express disapproval of such a method of procedure on the part of the railroad companies as to lead them to withhold the greater part of their evidence from the commission and first adduce it in the circuit court."

The Washington legislature has attempted to eliminate or at least to ameliorate the conditions condemned in the foregoing case.

Excessive Penalties.

It was contended in the court below, and, under the assignments of error, will undoubtedly be contended here, that the act under consideration is void because the penalties prescribed are so large as to practically preclude recourse to the courts to have the orders of the commission reviewed judicially. Clearly this question has been eliminated by the decision of the state su-

preme court. It was there held that the alleged excessive penalties might fall and the remainder of the act stand. The construction of the act thus placed upon it by the state tribunal is binding and conclusive upon this court; and therefore should this court conclude that the penalties proscribed in the act are excessive, the effect of that conclusion will be simply to eliminate the penalty provisions of the law, leaving unaffected the requirement of the commission that physical connections be made.

The decision of the Washington court is in accord with the decision of this court in *Reagan v. Farmers' Loan & Trust Co.,* 154 U. S. 362, an action involving the validity of the railroad commission law of Texas, where the court said:

"We do not deem it necessary to pass upon these specific objections (excessive penalties, and one other objection) because the fourteenth section or any other section prescribing penalties may be dropped from the statute without affecting the validity of the remaining portions, and if the rates established by the commission are not conclusive they are at least *prima facie* evidence of what is reasonable and just. For the purpose of this case it may be conceded that both clauses are unconstitutional, and still the great body of the act remains unchallenged —that which establishes the commission and empowers it to make reasonable rates and regulations for the control of railroads. It is familiar law that one section or one part of an act may be

invalid, without affecting the validity of the remaining portion of the statute. Any independent provision may be dropped out if that which is left is fully operative as a law, unless it is evident from a consideration of all of the sections that the legislature would not have enacted that which is within, independently from that which is beyond its power. Applying this rule and the individuality of these two provisions may be conceded without impairing the force of the rest of the act."

It is submitted, however, that the act does not impose an excessive penalty nor prevent recourse to the courts in any proper case. Indeed the act aids and invites the carrier to institute an action of review within twenty days after the service of any order upon it, and expressly empowers the court, in any action so instituted, if it shall be of the opinion that the order complained of is unreasonable or unlawful, to suspend the same during the pendency of the litigation (sec. 3). It is true that if the carrier fails to avail itself of its right to apply for a suspension of an order pending the litigation, or if it fails to avail itself of the right to review the order of the commission, then, upon failure to obey the order, the action for the penalties accrues, subject only to the provision that the judgment for any penalties shall be provisional only, and shall not become absolute until the final decision in the review proceeding (sec. 7).

THE ORDER IS NOT SO UNREASONABLE OR ARBITRARY AS TO OPERATE AS A TAKING OF PROPERTY WITHOUT DUE PROCESS OF LAW.

It must be admitted that the testimony introduced before the commission as to the character of the traffic, and the nature of the traffic movement in the territory served by the lines of railway affected by the order, is not of a very satisfactory or definite character. But it cannot be said that the commission acted arbitrarily. An examination of transcript of the testimony will show that the commission made a *bona fide* endeavor to get as much information as possible concerning these questions. We do not understand, however, that it is claimed that the commission acted arbitrarily, or without affording an opportunity for a full presentation of the facts, or in disregard of any fact or matter proper for its consideration. As we understand the contention of the plaintiff in error, it is claimed that because the physical connections involved in the order necessitate some considerable outlay of money, and because there was no convincing showing of a demand for these connections, that the order is so unreasonable in itself as to operate as an arbitrary or capricious confiscation of property.

Before the contention of the plaintiff in error

thus made can be sustained, it must clearly appear that the order complained of is so arbitrary or unreasonable as to amount to a confiscation of its property, and the burden of showing this violation of its constitutional right devolves upon the plaintiff in error. This follows naturally, as well as legally, from the very nature of the case. The officers and employes of a common carrier, by reason of their familiarity with the nature of its traffic and the conditions under which it moves, are in a far better position than an outsider to state those facts and conditions. Under these circumstances it is but natural that we should expect, at a hearing of this kind before a railroad commission, that the companies themselves appear prepared with facts and figures taken from their books and records sufficient to show, if they contend such to be the case, that the volume of the traffic was insufficient, or by reason of the kind of traffic there was no demand for physical connections at the places where the commission was seeking to have the same installed. Here we invite the attention of the court to the testimony of the only witnesses produced at the hearing on behalf of the railroad defendants, and testifying as to the necessity of the physical connections here involved (Transcript of Rec-

ord, pp. 107-111). Mr. Palmer, the general superintendent of the Northern Pacific Railway Company, testified, in substance, that the interchange track at Garfield "would *probably* cover the ground very thoroughly on a joint interchange," and that all the business could be handled there without discommoding anybody "so far as we are concerned." The remainder of the testimony of this witness related to the danger of grade crossings and the expense of switching on interchange tracks. Mr. Buckley, general superintendent of the Oregon Railroad & Navigation Company, does not venture to assert that there is no necessity for physical connections at the various points mentioned in the questions propounded to him, but contents himself with statements that he does not know of traffic being offered at the points sufficient to warrant connections there, and that there has never been any request for an interchange or any business to call for interchange. It is to be presumed that shippers possess ordinary intelligence, and that knowing that points possess no facilities for the interchange of cars, they will not request the routing of freight over an interchange track that does not exist.

It is difficult, within the limits of a brief, to

describe the conditions of the traffic in this territory that necessitate all of these interchange tracks. The necessity of some of them, however, is apparent from a mere glance at the railroad commission map found at page 115 of the Transcript of Record. It is apparent that a merchant at any of the towns along the line of the Spokane & Inland, or along the line of the Northern Pacific south of Spokane, should be enabled to make purchases of carload freight at Portland and secure delivery of the same without the necessity of its being taken to Spokane, there transferred and hauled back on the other line. It is equally apparent that a merchant at one of the towns along the line of the Oregon Railroad & Navigation Company between Connell and La Crosse should be enabled to obtain his merchandise from the wholesalers of Puget Sound over the lines of the Northern Pacific and Oregon Railroad & Navigation Company, with a transfer at Connell, instead of being compelled to submit to the delay and additional expense of a transfer at Wallula or Spokane.

It is submitted that the record fails to show any arbitrary, capricious or unreasonable requirement of the commission in respect to these physical connections, but that, on the contrary,

the record shows a necessity for a connection at each place required.

Respectfully submitted,

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Of Counsel for Defendants in Error.

APPENDIX.

Provisions of Railroad Commission Law of 1905, as Amended by Law of 1907.

Sec. 3. That the freight and passenger tariffs, charges for transportation of loaded or empty cars, whether said freight or cars be transported over one line of railroad or over two or more lines of railroad, charges for demurrage and reciprocal demurrage, as hereinafter defined, trackage, railroad connections, sidings, equipment, facilities, train service, waiting rooms for passengers and rooms for freight and baggage at all stations of railroads, and charges for each kind and class of property, money, papers, packages and all other things to be charged for and received by each express company, on all such property, money, packages and things which by the contract to carry are to be transported by said express company, to be demanded, collected, enforced or performed by railroad or express companies shall be just, fair, reasonable, and sufficient; and the said Railroad Commission of Washington is hereby vested with power and authority, upon complaint made as hereinafter provided or by inquiry upon their own motion, after a full hearing, to make any finding declaring any existing rate or absence of rate, joint or other-

wise, for the transportation of persons or property, or any regulation whatsoever affecting said rate or charge for transportation of loaded or empty cars, whether the said rate charged be over one line of railroad or over two or more lines of railroad, or demurrage or reciprocal demurrage or the sufficiency of the trackage, railroad connections, siding, equipment, facilities, train service, and waiting rooms for passengers and rooms for freight and baggage to be unreasonable, or unjustly discriminatory, or insufficient, and to declare and order what shall be a just and reasonable rate, joint or otherwise, practice, rule, regulation or thing to be charged, imposed, enforced or performed or followed in the future in the place of that found to be unreasonable, or unjustly discriminatory or insufficient, and to order that additional trackage or sidings be constructed, and to order that additional equipment and facilities for the movement of passengers and freight be furnished, and that railroad connections be made or to make any finding declaring any existing rate for the transportation of persons or property, or any classification which has been the subject of inquiry, after notice duly given, to be sufficiently remunerative to the railroad company, or to be reasonable, proper and sufficient, and to order that

the same be not changed, altered, abrogated or discontinued, either by changing the rate or classification, without first obtaining the consent of the commission authorizing such change to be made, and the order of the commission shall of its own force take effect and become operative twenty days after notice thereof has been given to the railroad or express company affected thereby; which said order shall be served on railroad and express companies by delivery of a certified copy thereof under the seal of the commission, either to the attorney for the railroad or express company, or the said company itself. Service of said order upon any officer upon whom summons in civil actions might be served shall be a sufficient service thereof. And any railroad or express company affected by the order of the commission and deeming it to be contrary to the law, may institute proceedings in the superior court of the State of Washington in the county in which the hearing before the commission upon the complaint had been held, and have such order reviewed and its reasonableness and lawfulness inquired into and determined. Pending such review, if the court having jurisdiction shall be of the opinion that the order or requirement of the Commission is unreasonable, or unlawful, it may suspend the same until the fur-

ther order of the court pending such litigation, in which event the court shall require a bond of good and sufficient security conditioned that the carrier or carriers petitioning for such review shall answer for all damages caused by the delay in the enforcement of the order of the Commission, and all compensation for whatever sums for transportation service any person or corporation shall be compelled to pay pending the review proceedings, in excess of the sums such person or corporation would have been compelled to pay if the order of said Commission had not been suspended. Said action of review shall be taken by the said railroad or express company within twenty days after notice of said order, and if said action of review is not taken within said time, then in all litigation thereafter arising between the State of Washington and said railroad or express company, or private parties and said railroad or express company, the said order shall be deemed final and conclusive. If, however, said action in review is instituted within said time, the said railroad or express company shall have the right of appeal or to prosecute by other appropriate proceedings, from the judgment of the superior court to the Supreme Court of the State of Washington, as in civil actions. In all such proceedings, how-

ever, bonds shall be required conditioned as hereinbefore provided in addition to the usual appeal bond. The action in review of such order, whether by writ of review or appeal, or otherwise, shall be heard by the court without intervention of a jury and shall be heard and determined upon the evidence and exhibits introduced before the Commission and certified to by it. No complaint shall at any time be dismissed because of the absence of direct damage to the complaint.

(a) The Commission may at any time, upon notice to the railroad and after opportunity to be heard as provided in section 6 of the act creating the Railroad Commission, rescind, alter or amend any order fixing any rate or rates, fares, charges or classifications, or any other order made by the Commission; and certified copies of the same shall be served and take effect as in said act provided for original orders.

(b) In case any order of the Commission made as herein provided shall not be appealed from or reviewed within the time herein provided, any railroad or other person or corporation affected or aggrieved by any order of the Commission, and being dissatisfied with any order of the Commission fixing any rate or rates, joint or otherwise, or fixing a division of any joint rate, or being dissatisfied with any fares,

charges, classification, or any order fixing any regulation, practice or service, may, after the expiration of six months after the taking effect of such order, petition the Commission for a rehearing upon the matters involved in such order setting forth in such petition the grounds and reasons for such rehearing, which grounds and reasons may comprise and consist of changed conditions since the promulgation of such order, or by showing a result from the effect of such order injuriously affecting the petitioner which was not considered or anticipated at the time of the former hearing, or for any good and sufficient cause which for any reason was not considered and determined in such former hearing.

Upon the filing of such petition proceedings shall be had thereon as are provided in this act for other hearings, and appeals may be prosecuted the same as provided for other orders of the Commission: *Provided, however,* That no injunction or restraining order shall issue staying any order of the Commission based on or by reason of such petition for rehearing, and no order of the Commission made on such rehearing shall affect any right of action or penalty accruing under such original order, unless so ordered by the Commission. (Laws 1907, p. 537.)

SEC. 5. That if any railroad or express company, or officer, or agent thereof, bound thereby, shall refuse or neglect to obey or perform any order of the Commission mentioned in this act, the Commission may apply by petition to the superior court of this state, in any county in this state, in or through which the said railroad or express company is doing business, to enforce obedience to its order by writ of injunction or other appropriate process, and in addition thereto, the offending party shall, for each day of the continuance of said refusal or neglect, be subject to a penalty of two hundred and fifty dollars, which together with the cost of suit, shall be recoverable by the Commission in an action instituted by it, on the relation of the State of Washington, in the superior court of the State of Washington, in any county in this state, in or through which said railroad or express company runs or does business. (Laws 1905, p. 149.)

SEC. 6. When complaint is made to the Commission in writing by any person, firm, corporation, chamber of commerce, board of trade, or any commercial, mercantile, agricultural, or manufacturing society, or any body politic or municipal corporation in this state that any freight or passenger tariff rate or charge, or absence of tariff rate or charge, joint or otherwise,

for the transportation of passengers or loaded or empty cars, whether the same be over the line of one railroad company or over the lines of two or more railroad companies, or trackage, railroad connections, siding, or charge for the storing and handling of freight, rates of charge for all kinds or classes of property, money, packages, papers, or other things to be charged for and received by each railroad and express company, which by the contract of carriage are to be transported by said railroad or express company between points within this state, is unreasonable or unjustly discriminatory, or that any train service of railroads, whether freight or passenger, or the amount of trackage, or waiting rooms for passengers, or rooms for freight or baggage at any station, or that cars of same are insufficient or improper, the Commission shall thereupon give to the railroad or express company to be affected thereby, thirty days' written notice of the time and place when and where such complaint will be heard, and said railroad or express company shall be entitled to be heard at such time and place, to the end that justice may be done, and the Commission shall issue process to enforce the attendance of all necessary witnesses. All process herein provided for shall be served as in civil cases; issues shall be made

up without delay as nearly as practicable as in civil cases; such complaint shall be instituted in the name of the Commission, and all railroads, express companies, and carriers interested, shall be made parties to the hearing, and on such hearing all complaints made concerning any rates, or absence of rates, joint or otherwise, charges, tolls, sufficiency of train service, trackage, railway connections, sidings, equipment, or facilities, rules and regulations, or other matters upon which complaints may be founded, may be joined in the one hearing, and no motion shall be entertained against such complaint for misjoinder of complaint or grievances, or misjoinder of parties; it being the intention of this act to authorize said Commission to inquire into all grievances whereof complaint may have been made, or by inquiry upon its own motion at one hearing, and by one order and judgment, decide and adjust the same, and in any review in the courts of the orders of the Commission, the same rule shall apply and pertain with regard to the joinder of complaints, and parties, as herein provided: *Provided,* All grievances to be inquired into whether by complaint made to the Commission or by inquiry upon its own motion, shall be set out in the complaint, which shall be served upon the railroad, or express company, together with notice of the time and place of hearing.

(a) The Commission is hereby authorized and empowered to adopt, promulgate, and issue rules and regulations governing the bulletining of trains, showing the time of arrival and departure of all trains and the probable time of arrival of delayed trains. The conditions and limitations to be contained in and become a part of contracts for transportation of freight and passengers and express packages. The hours which station and waiting rooms shall be kept open, rules governing demurrage and reciprocal charges, and generally such rules as pertain to the comfort and convenience of the public. Such rules and regulations shall be promulgated and issued by the Commission on its own motion, and shall be served on the railroad companies affected thereby as other orders of the Commission are served. Any railroad company affected thereby and deeming such rules and regulations improper, unjust, or contrary to law, may within twenty days from the date of such service of such order upon it file objections thereto with the Commission, specifying the particular grounds of such objection. The Commission shall, upon receipt of such objections, fix a time and place for hearing the same, and after a full hearing may make such changes or modifications thereto as the evidence may justify.

The Commission shall have power to adopt rules to govern its proceedings, and to regulate the mode and manner of all investigations and hearings: *Provided,* No person desiring to be present at any such hearing shall be denied admission.

(b) The chairman, and each of the Commissioners, for the purposes mentioned in this act, shall have power to administer oaths, certify to all official acts, and to issue subpoena for the attendance of witnesses, and the production of papers, way bills, books, accounts, documents and testimony. The superior court of the county in which any proceeding under this act may be instituted, shall have power to compel the attendance of witnesses and the production of papers, way bills, books, accounts, documents and testimony as required by said subpoena. The said Commission before which the testimony is to be given or produced, in case of the refusal of any witness to attend, or testify, or produce any papers required by the subpoena, shall report to the superior court in and for the county in which the proceeding is pending by petition, that due notice has been given of the time and place of attendance of said witnesses, or the production of said papers, and that the witness has been summoned in the manner provided in this act,

and that the fees and mileage of the witness has been paid or tendered to the witness for his attendance and testimony, and that the witness has failed or refused to attend or produce the papers required by the subpoena, before said Commission, in the cause or proceeding named in the notice and subpoena, and ask an order of the said court, compelling the witness to attend and testify before the said Commission; the court upon the petition of the Commission shall enter an order directing the witness to appear before the said court, at a time and place to be fixed by the court in such order, and then and there show cause why he has not responded to said subpoena. A copy of said order shall be served upon said witness. If it shall appear to the court that said subpoena was regularly issued by said Commission, the court shall thereupon enter an order that said witness appear before said Commission at said time and place as fixed in said order, and testify or produce the required papers, and upon failing to obey said order, said witness shall be dealt with as for contempt of court. In all proceedings before the Commission the Commissioners shall have the right in their discretion, to limit the number of witnesses testifying upon any subject or proceeding to be inquired of before the Commission.

(c) In case the decision or order of the Commission concerning any freight or passenger tariff, rate or charge for the transportation of loaded or empty cars, whether the same be over the line of one railroad company or over the lines of two or more railroad companies, or for demurrage or reciprocal demurrage or charge for the storing or handling of freight, rates of charge for any kind or class of property, money, packages, papers or other things to be charged for or received by any railroad or express company inquired into by the Commission on the written complaint of any person or number of persons shall be unsatisfactory to any of the persons so making written complaint, upon any matter embraced in such written complaint, such dissatisfied party shall have the right to appeal from the order of the Commission to the superior court of the State of Washington in the county in which the hearing before the Commissioners had been held. Said appeal shall be taken by serving on the Commission or filing with it a notice of appeal specifying the order or portion of the order appealed from within twenty days from the rendition of such decision and the execution and filing within said time of a bond in the sum of one hundred dollars conditioned to

pay the costs of such appeal, which bond shall go to the State of Washington. Upon receipt of such notice and bond the Commission shall notify all persons interested in the subject-matter of said appeal being taken. On said appeal the order or portion of order appealed from shall be tried by the superior court without the intervention of the jury and shall be heard and determined upon the evidence and exhibits introduced before the Commission and certified to by it, and the said court shall render such decision concerning the matter complained of as the justice of the case may require. (Laws 1907, p. 545.)

SEC. 7. In all actions between private parties and railroad or express companies brought under this law, and in all actions for the enforcement of penalties provided for in this act, the rates, charges, classifications and orders prescribed by the Commission as hereinbefore provided, shall be held conclusive, and deemed and accepted to be fair and just; but in every such action any judgment averse to the railroad or express companies rendered after the Commission has determined the rate, charge, classification or order, and while same is pending on writ of review or appeal, and prior to the final determination of such action under section three of this act, determining the reasonableness of such

rate, charge, classification or order, shall be provisional only, and enforcement thereof and process thereunder, shall be stayed pending the final determination of such writ of review or appeal. Upon final determination of such writ of review or appeal, if the judgment therein be in favor of the rate, charge, classification or order prescribed by the Commission, the judgment theretofore provisional, shall thereupon become absolute, but if the determination be against the rate, charge, classification or order prescribed by the Commission, in such event the judgment theretofore provisional, shall be set aside or modified by the court to meet the final determination thereof. (Law 1905, p. 152.)

SEC. 8. That whenever the Commission, under section 3 of this act, has determined any rate, regulation, order, classification or charge, in any appeal or writ of review brought by a railroad or express company to determine the reasonableness of such rate, regulation, order, classification or charge, the burden of proof shall be upon said railroad or express company to establish that such rate, regulation, order, classification or charge, established by the Commission is unreasonable or unjustly discriminatory or insufficient. (Laws 1905, p. 153.)

SEC. 9. The superior court of the State of Washington, in any county in or through which the said railroad or express companies are doing business, shall have jurisdiction to enforce by proper decree, injunction or orders, the rates, classifications, rulings, orders and regulations made or established by the Commission. The proceeding therefor shall be by equitable action in the name of the state and shall be instituted by the Attorney General whenever advised by the Commission that any railroad or express company or person operating a line of railways or express company in the state is violating or refusing to comply with any rule, order, rate, classification or regulation made by the Commission and applicable to such railway or express company. It shall be the duty of the superior court in which such action is pending to require the issues therein to be promptly made up, and to give the same precedence over all other civil business of a different nature. If in such action the court finds that the said defendant has failed, without sufficient cause, to comply with the rule, regulation, order, rate or classification so made and established, the court shall decree a mandatory injunction compelling obedience to and compliance with the rule, rate, order, regulation or classification by the defendant and its officers,

agents, servants and employes, and may grant such other relief as may be deemed just and proper. Any violation of such decree shall render the defendant and every officer, agent, servant and employe of the defendant who is in any manner instrumental in such violation, guilty of contempt, and upon conviction thereof shall be fined in a sum not exceeding one thousand ($1,000) dollars for each offense, or may imprison the person guilty of contempt until he shall sufficiently purge himself therefrom, and such decree shall continue and remain in effect and be in force until the rule, order, regulation, rate or classification shall be modified or vacated by the Commission, but the defendant railroad or express company may thereafter petition the Commission for and obtain a modification of the decree by reason of any change of circumstances occurring after the decree such as to render the rule, order, regulation, rate or classification involved unreasonable or unjust. An appeal within the same time as other actions, shall be allowed to the Supreme Court from the decree in such actions, and the cause shall have precedence over all other civil actions of a different nature pending in the Supreme Court. (Laws 1905, p. 153.)

STATE OF WASHINGTON EX REL. OREGON RAILROAD AND NAVIGATION COMPANY *v.* FAIRCHILD ET AL., STATE RAILROAD COMMISSIONERS.

ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

No. 118. Argued December 18, 1911.—Decided April 29, 1912.

An order of a railroad commission requiring a railroad company to expend money and use its property in a specified manner is not a mere administrative order, but is a taking of property; to be valid there must be more than mere notice and opportunity to be heard; the order itself must be justified by public necessity and not unreasonable or arbitrary.

The hearing which must precede an order taking property must not be a mere form, but one which gives the owner the right to secure and present material evidence; but a state statute which gives the privilege of introducing such evidence, affords compulsory process, and gives the right of cross-examination, does not deny due process by not affording sufficient opportunity to be heard.

The hearing is sufficient if the person whose property is to be taken is put on notice as to the order to be made, and given opportunity to show that it is unjust or unreasonable.

An opportunity given to test, by review in the courts, the lawfulness of an order made by a commission does not deny due process because on such review new evidence (other than newly discovered or necessary on account of surprise or mistake) is not allowed, and because the court must act on the evidence already taken, if the court is not bound by the findings, and the party affected had the right on the original hearing to introduce evidence as to all material points.

Where the party whose property has been taken has not been deprived of a right to be heard, the question is whether as a matter of law the facts proved a public necessity justifying the taking.

A State, acting through an administrative body, may require railroad companies to make track connections, *Wisconsin &c. R. R. Co.* v. *Jacobson*, 179 U. S. 287, but such body cannot compel a company to

build branch lines, connect roads lying at a distance from each other, or make connections at every point regardless of necessity; each case depends on the special circumstances involved.

In a proceeding brought to compel a carrier to furnish facilities not included in its absolute duties, the question of expense is of controlling importance.

In this case the record does not disclose any public necessity justifying the order of the State Railroad Commission of Washington to require track connections to be made at eight points.

The burden is on a state railroad commission to show that public necessity requires track connections, and the Commission is charged with notice that the reasonableness of its order is to be determined at the hearings before it.

While the statute of the State of Washington authorizing the State Railroad Commission to order additional trackage is not unconstitutional as denying due process of law, the orders in this case were not justified by public necessity, and therefore deprived the railroad company of its property without due process of law.

52 Washington, 17, reversed.

A STATUTE of the State of Washington (March 7, 1905, Sess. Laws, 1905, c. 81, p. 145, as amended March 16, 1907, Sess. Laws, 1907, c. 226, p. 536), authorizes the Railroad Commission, upon complaint made, or on inquiry upon its own motion "after a full hearing . . . to order that additional trackage or sidings be constructed . . . and that additional connections be made."

In pursuance of this act, and by direction of the Commission, the Attorney General filed a complaint against the Oregon Railroad & Navigation Company, chartered under the laws of Oregon, the Northern Pacific Railway Company and the Spokane & Inland Railroad, praying for an order requiring them to connect their tracks at Pullman, Colfax, Garfield, Oakesdale, Rosalia, Waverly, Thornton, Farmington, Connell and Palouse. The complaint averred that four of these towns were important shipping points, and that at all of them there was a demand that cars should be transferred from one line to the

other, and a public necessity that track connection should be made between the roads at all these points. The Oregon Company filed an answer in which it denied that the towns named were important shipping points; denied that there was, or had ever been, any public demand for the interchange of business at any of the places, or that there was any public necessity for the connection.

At the hearing, evidence was introduced showing that the Spokane & Inland was an electric road not yet completed; that all the roads had the same gauge; that in three of the towns they crossed at grade; that in the others the tracks were generally on the same level, and separated by distances varying from a few feet up to 600 feet; that the connecting tracks would generally be on the right of way of the carriers, though in some instances it would be necessary to acquire other property by purchase or condemnation. There was evidence as to the price of switches and the cost per lineal foot of laying a track with two necessary connecting switches.

The principal witness on behalf of the State was an inspector of the Commission, who testified that the three roads were competitors, and ran from Spokane through each of the towns named in the complaint; that wheat was the principal product of the country, and that it was shipped to Spokane or Portland, reached by each of the roads or their connections; that the main business of the towns named in the complaint was with Spokane; and that the business between local stations was small. From his testimony and a map it appears that, with the exception of Connell, all of the towns named lay in a strip about fifty miles long and fifteen miles wide, one road on each side, with the Spokane running about half way between the other two; that the roads were generally parallel to each other, but by curves and branch lines reached these towns. In answer to specific inquiries he gave the route a car would take if shipped from named stations on one

line to named stations on another, under present conditions; and said that if the connections were made and cars took that route the distance would be shortened, and that if wheat, cattle or other property was thus shipped to and from such stations there would be a saving in time and distance. He testified that he had no knowledge as to the amount of business done at any of the towns named, or that such shipments had been offered or would be made. He and the other witnesses on behalf of the Commission testified that every purpose would be served if there was a connection between the various roads at one of the points named, some of them thinking Garfield the best point and others that it should be at Oakesdale, from which it was said the tracks radiated like the spokes of a wheel. It appeared that the Oregon already connected with the Northern Pacific at Garfield. The inspector and other witnesses were not asked specifically as to all points, but in answer to inquiries testified, without contradiction, that there was no necessity for connecting the tracks at Farmington, Thornton, Colfax, Waverly, nor at Garfield or Oakesdale except as indicated above.

The witnesses for the carrier testified that a connection at Garfield would accommodate all transfers that might be offered; that there had been no demand at any of the towns for such transfers in the past, and that there was no necessity for making them.

Only one shipper was called as a witness. He testified that a connection at Oakesdale would serve all purposes, but gave no information as to the amount of his freight business, nor the saving that would result to him or others if the connection was put in. No merchants or shippers from any of the towns named in the complaint, or referred to in the evidence, were called. There was no proof as to the volume of business at any of these places, nor as to the amount of freight that would be routed over these track connections if they were constructed. Nor was there any

testimony as to the probable revenue that would be derived from the use of the track connections or of the saving in freight or otherwise that would result to shippers. The Inspector of the Commission testified that these connections would develop very little business.

After the conclusion of the evidence the Commission dismissed the complaint as to Rosalia and Palouse, where the crossings were not at grade, and made an order in which it found that the roads crossed at grade at two points and ran in close proximity to each other through all the other places; that there was a public necessity for track connection, the cost of which, at each point, was stated, varying from $316 to $1,460, and aggregating about $7,000. It thereupon ordered that the companies should agree among themselves as to the particular places in said towns where the tracks should be laid and how the expense should be divided, in default of which the Commission would make a supplemental order designating the particular places where the connections should be made and the proportion in which the expense should be borne by each company.

The Oregon Company, being dissatisfied with this order, filed in the Superior Court of Thurston County, a Petition for Review, alleging the unconstitutionality of the statute under which the order had been made, and also attacking its reasonableness on the ground that "there was no evidence showing or tending to show that there was any public demand or public necessity for such track connection, or for the interchange of freight at either of said points in carload lots . . . or that any public convenience would be subserved," but on the contrary that the only evidence offered tended to show that there was no public necessity and that it would be obliged to acquire additional property and to incur large expense to make the connection without any public necessity and be thereby deprived of its property without compensation

and without due process of law in violation of the Constitution of the United States.

This method of attacking the order by Petition for Review was in compliance with the provisions of the Washington statute which declared that "the order of the Commission shall of its own force take effect and become operative twenty days after notice thereof has been given. . . . And any railroad or express company affected by the order of the Commission and deeming it to be contrary to the law, may institute proceedings in the superior court . . . and have such order reviewed and its reasonableness and lawfulness inquired into and determined. Pending such review, if the court having jurisdiction shall be of the opinion that the order or requirement of the Commission is unreasonable, or unlawful, it may suspend the same . . . pending such litigation. . . . Said action of review shall be taken by the said railroad or express company within twenty days after notice of said order, and if said action of review is not taken within said time, then in all litigation thereafter arising between the State of Washington and said railroad or express company, or private parties and said railroad or express company, the said order shall be deemed final and conclusive. If, however, said action in review is instituted within said time, the said railroad or express company shall have the right of appeal or to prosecute by other appropriate proceedings, from the judgment of the superior court to the Supreme Court of the State of Washington, as in civil actions. . . . The action in review of such order, whether by writ of review or appeal, or otherwise, shall be heard by the court without intervention of a jury and shall be heard and determined upon the evidence and exhibits introduced before the Commission and certified to by it. . . ."

The Bill of Exceptions recites that on the hearing, in the Superior Court, the Oregon Company offered com-

petent and non-cumulative testimony in support of its contention on the issues between it and the Commission, which if received would have tended to show that there was no public necessity for such track connections at either of the places; that no public convenience would be served by making them, and that the cost, instead of aggregating $7,500, would be $21,000 (the amount at each place being specified), besides the expense of acquiring additional land and franchises needed for the construction and operation of the tracks. The court rejected all this evidence on the ground that, under the statute, the Petition for Review must be determined on the testimony which had been submitted to the Commission. After argument the Petition was dismissed and the Oregon Company excepted. All of the evidence introduced before the Commission and attached as an exhibit to its answer, was duly incorporated in the Bill of Exceptions, which also contains a recital that the photographs and maps identified by one of the witnesses, had not been forwarded by the Commission, nor were they considered by the court. There was, however, no motion by the defendant for an order requiring such omitted papers to be sent up so as to complete the record. Neither did it appear that any motion was made before the Commission to require a more definite statement of the location of the proposed tracks.

The judgment dismissing the Petition was affirmed by the Supreme Court of the State. 52 Washington, 17. It held that the statute was valid; that it gave the defendant every opportunity to make its defence and granted an adequate judicial review by which to test the validity of the order. In answer to the contention that the evidence showed that the order was unreasonable and amounted to a taking of property without public necessity, the court merely said (p. 32): "As to the public necessity for the track connections, we are not prepared to say that the

finding of the commission in that respect was not justified by the testimony." The cause was brought here by writ of error, in which it is contended that the Washington statute failed to furnish an adequate hearing or opportunity for judicial review, especially in prohibiting the submission to the court of competent evidence as to the unreasonableness of the order; and, further, there was no evidence of a public necessity and that the order was void as taking property without due process of law.

Mr. Maxwell Evarts, with whom *Mr. Zera Snow* and *Mr. W. W. Cotton* were on the brief, for plaintiff in error:

The Railroad Commission Law of Washington of 1905, as amended in 1907, and the method of enforcement of the regulation of railroads provided for by that law constitute a taking of the property of the plaintiff in error without due process of law and a denial of the equal protection of the laws because adequate or effective judicial remedies to the owners of railroad property in the State are not provided for the determination of controversies arising upon the question of whether there has been a just and reasonable exercise of the power of regulation.

All regulation of the business of common carriers, whether taking the form of a regulation of rates or the making of track connections, must be reasonable, and the question of the reasonableness or unreasonableness of all such attempted regulations is essentially a judicial question, which if not permitted by the law under which it is undertaken, constitutes the taking of property without due process of law and amounts to a denial of the equal protection of the law. *Railroad Commission Cases*, 116 U. S. 307; *Chicago &c. Railway* v. *Minnesota*, 134 U. S. 418; *Chicago &c. Railway* v. *Wellman*, 143 U. S. 339; *Reagan* v. *Farmers' L. & T. Co.*, 154 U. S. 362, 397; *Lake Shore &c. Railway Co.* v. *Smith*, 173 U. S. 684, 697; *Smyth* v. *Ames*, 169 U. S. 466, 526.

If the State has no power to prevent a resort to the Federal courts to redress what is claimed to be a wrongful invasion of a property right, it should be equally powerless to prevent in the Federal court a full examination of the very questions at issue. It is an anomaly in judicial procedure to say that if the litigation proceeds in the state court it must be heard and determined on the evidence taken before the Commission, while if it proceeds in the Federal court a right to a full investigation of the facts exists. *Chicago, Milwaukee &c. Ry.* v. *Tompkins*, 176 U. S. 167, 172; *Wisconsin &c. Railroad Co.* v. *Jacobson*, 179 U. S. 287, 297; *Louisiana & A. Railway* v. *The State*, 85 Arkansas, 12.

One of the main cases relied upon by the appellant, *Chicago &c. R. Co.* v. *Minnesota*, 134 U. S. 418, was decided expressly upon the theory that no judicial determination was permitted.

A hearing before the Railroad Commission and the review in the Superior Court do not constitute due process because the Railroad Commission of the State of Washington is not a court; in the hearing before the Superior Court, § 8 places upon the railroad company the burden of setting aside the order of the Commission, but the statute requires that such hearing shall be had only on the evidence taken before the Commission and certified by the Commission. Prior to the order of the Commission, the railroad company had practically no knowledge of what the order would be and what proof should be introduced by it. The statute does not provide adequate means whereby the railroad company can obtain and introduce evidence before the Commission.

While the Commission may provide for hearings, process to enforce the attendance of witnesses before the Commission, or to enforce testimony from contumacious witnesses can issue only by the Superior Court, and then only at the instance of the Commission—but not of the railroads.

If process to compel the attendance of a witness is necessary and the Commission should refuse to apply for it, there is no method of reviewing its action.

If evidence is offered by the railways before the Commission and it is rejected, there is no method of review of the action of the Commission.

The Commission may take testimony by deposition—the railroad companies may not.

The Commission has no power to enforce its own orders, but a suit must lie at the instance of the State, and by the Attorney General, under direction of the Commission, to compel obedience to its orders.

Rules of evidence to guide the Commission in taking or receiving testimony are not provided for, nor is any order of proof provided for.

The Commission has power to limit the number of witnesses, and if this power is capriciously exercised, there is no method of review of the action of the Commission.

An investigation by such a tribunal with such powers, and without "the machinery provided by the wisdom of successive ages for the investigation judicially of the truth of a matter in controversy" cannot be said to afford to the owners of railway property the judicial protection which, by the many decisions of this court, it has been held they are entitled to in the determination of the question of reasonableness or unreasonableness of the Commission's orders; such a court is a court without rudder or compass. *Davidson* v. *New Orleans*, 96 U. S. 107; *Hagar* v. *Reclamation District No. 108*, 111 U. S. 708; *Chicago, Burlington and Quincy Railroad* v. *Chicago*, 166 U. S. 240.

The Commission failed to make return of very important evidence, which might have aided the court in its determination; nevertheless under § 3, the case must be heard in the Superior Court upon the evidence certified to by the Commission.

The Railway Commission Law is unconstitutional be-

cause of the excessive penalties which follow a refusal to comply with the Commission's orders, rendering a compliance necessary rather than resort to the courts for a decision as to the validity and reasonableness of the orders of the Commission. *Ex parte Young*, 209 U. S. 123.

There was no public necessity or public convenience to be subserved by the track connections ordered; the order was an unreasonable and arbitrary exercise of bald power, and as such it constituted a taking of the property of the plaintiff in error without due process of law.

The testimony clearly indicates that all the connections ordered were unnecessary, and such is the finding of the chairman of the Commission. In fact the ordering of all the connections in the order was a bald exercise of power by the Commission unsupported by any evidence showing any reason or necessity therefor. Under such conditions the order constitutes the taking of property without due process of law. *Wisconsin R. R. Co.* v. *Jacobson*, 179 U. S. 287; *Louisiana & A. Ry.* v. *The State*, 85 Arkansas, 12.

When the question of reasonableness of the regulation of a carrier is up for consideration, the evidence leading up to the regulation must be examined. *C. N. & St. P. Ry.* v. *Tompkins*, 176 U. S. 167, 172; *Wisconsin R. R.* v. *Jacobson*, 179 U. S. 287; *Atl. Coast Line* v. *N. Car. Commission*, 206 U. S. 1; *Louisiana & A. Ry.* v. *The State*, 85 Arkansas, 12.

Mr. W. V. Tanner, Attorney General of the State of Washington, with whom *Mr. Walter P. Bell* and *Mr. S. H. Kelleran* were on the brief, for defendants in error:

The Railroad Commission Law of Washington does not deny the due process of law clause.

After the order of the commissioners becomes a finality the Attorney General may institute an equitable action in the name of the State in the Superior Court to procure the

enforcement of the same. Provision is made for the railroad company to petition for modification of any order of the Commission whenever surrounding circumstances have changed, and the same appellate or review proceedings are provided for a decision on that order as in original cases.

An act which provides for personal notice and service of a copy of the complaint, with full and complete opportunity to appear, introduce witnesses, with compulsory process for their attendance, and a full hearing before a special tribunal, legally constituted by appointment by the Governor of the State, subject to the confirmation of the state senate, members under oath and bond, does not deprive a railroad company, whose facilities are subject thereto, of its property without due process of law, because the provision in the act giving a right of appeal to the state court from an adverse decision of the Commission requires the state court to decide the case upon the evidence adduced before the Commission. *Long Island Water Supply Co.* v. *City of Brooklyn*, 166 U. S. 685; *Voigt* v. *Detroit*, 184 U. S. 115; *Goodrich* v. *Detroit*, 184 U. S. 432; *Ross* v. *Board of Supervisors*, 128 Iowa, 427; *S. C.*, 104 N. W. Rep. 506; *Fallbrook Irrigation District* v. *Bradley*, 164 U. S. 112.

Due process is not necessarily judicial process. *Reetz* v. *Michigan*, 188 U. S. 505; *Public Clearing House* v. *Coyne*, 194 U. S. 497; *United States* v. *Ju Toy*, 198 U. S. 253; *Murray's Lessee* v. *Hoboken &c. Co.*, 18 How. 272.

Nor is the right of appeal essential to due process of law. *Reetz* v. *Michigan*, 188 U. S. 505; *Andrews* v. *Swartz*, 156 U. S. 272.

While the state legislature cannot deny the right of review altogether, the judicial review, provided by the act in question, is not such as to deprive the plaintiff in error of its property without due process of law.

The state legislature could not, if it would, deny to a railroad company access to the Federal courts to set

aside, by injunction or other appropriate procedure, a schedule of rates or a requirement of service or facilities, which were so low, or otherwise so unreasonable, as to amount to confiscation of the property of the railroad. *Smyth* v. *Ames*, 169 U. S. 466; *Reagan* v. *Farmers' Loan & Trust Co.*, 154 U. S. 362.

The Washington act does not undertake to deprive the Federal courts of jurisdiction. *St. Louis & S. F. R. R. Co.* v. *Gill*, 156 U. S. 649; *Covington & L. Co.* v. *Sandford*, 164 U. S. 578; *San Diego Land & Town Co.* v. *National City*, 174 U. S. 739.

This court has never attempted to define the sort of judicial review which will satisfy the requirements of the Fourteenth Amendment. *Chicago, Milwaukee & St. Paul Railway Co.* v. *Minnesota*, 134 U. S. 418, is not an authority in this case. But see *Davidson* v. *New Orleans*, 96 U. S. 107; *Brown* v. *New Jersey*, 175 U. S. 172; *Hurtado* v. *California*, 110 U. S. 516, 537; *Louisville &c. R. R. Co.* v. *Schmidt*, 177 U. S. 230, 236; *Iowa Central R. R. Co.* v. *Iowa*, 160 U. S. 389, 393; *New York & N. E. Ry. Co.* v. *Bristol*, 151 U. S. 556, 571; *Capital Traction Co.* v. *Hof*, 174 U. S. 1; *Hagar* v. *Reclamation District*, 111 U. S. 701, 708; *Twining* v. *New Jersey*, 211 U. S. 77.

The act in question falls clearly within the principles announced by this court. Obviously the object of the legislature was to require the railroad companies to present their evidence to the Railroad Commission so that the tribunal may have the benefit of a full hearing. The Commission is thereby enabled to render its decision upon a complete presentation of all the facts. The saving in both time and expense resultant from this system alone justifies its adoption. The railroad companies under such a system must necessarily produce their testimony before the Commission. The testimony will there be preserved in written form and in the review proceeding the time of taking the testimony will be saved, and the expense of

transcribing and preserving the same need not again be incurred. *Chicago, Milwaukee & St. Paul Railroad Co.* v. *Tompkins*, 176 U. S. 167; *Smyth* v. *Ames*, 169 U. S. 466; *East Tennessee &c. R. R. Co.* v. *Interstate Commerce Commission*, 181 U. S. 1; *Cincinnati &c. Railway Co.* v. *Interstate Commerce Commission*, 162 U. S. 184.

The act under consideration is not void because the penalties prescribed are so large as to practically preclude recourse to the courts to have the orders of the Commission reviewed judicially. This question has been eliminated by the decision of the state Supreme Court. It was there held that the alleged excessive penalties might fall and the remainder of the act stand. The construction of the act thus placed upon it by the state tribunal is binding and conclusive upon this court. *Reagan* v. *Farmers' Loan & Trust Co.*, 154 U. S. 362.

The act does not impose an excessive penalty nor prevent recourse to the courts in any proper case.

The order is not so unreasonable or arbitrary as to operate as a taking of property without due process of law.

The record fails to show any arbitrary, capricious or unreasonable requirement of the Commission in respect to physical connections, but, on the contrary, the record shows a necessity for a connection at each place required.

MR. JUSTICE LAMAR, after making the foregoing statement, delivered the opinion of the court.

1. The Commission's order requiring the Oregon Company to make track connection was not a mere administrative regulation, but it was a taking of property, since it compelled the defendant to expend money and prevented it from using for other purposes, the land on which the tracks were to be laid. Its validity could not be sus-

tained merely because of the fact that the carrier had been given an opportunity to be heard, but was to be tested by considering whether, in view of all the facts, the taking was arbitrary and unreasonable or was justified by the public necessities which the carrier could lawfully be compelled to meet. For the guaranty of the Constitution extends to the protection of fundamental rights,—to the substance of the order as well as to the notice and hearing which precede it. "The mere form of the proceeding instituted against the owner, even if he be admitted to defend, cannot convert the process used into due process of law, if the necessary result be to deprive him of his property without compensation." *Chicago &c. Ry.* v. *Chicago*, 166 U. S. 226, 236; *Missouri Pacific Ry.* v. *Nebraska*, 164 U. S. 403, 416. So that where the taking is under an administrative regulation the defendant must not be denied the right to show that as matter of law the order was so arbitrary, unjust or unreasonable as to amount to a deprivation of property in violation of the Fourteenth Amendment. *Chicago &c. R. R.* v. *Minnesota*, 134 U. S. 418; *Smyth* v. *Ames*, 169 U. S. 466; *Chicago &c. R. R.* v. *Tompkins*, 176 U. S. 167, 173.

2. This was recognized by the Supreme Court of the State, which held that this constitutional right was not denied, but that the statute furnished, first, an adequate opportunity to be heard before the Commission, and then provided for a judicial review by authorizing the company to test the validity of the order in the Superior Court. Both of these rulings are assigned as error by the Oregon Company. It complains that the statute did not afford it the means of making a defence before the Commission and yet required it to attack the reasonableness of the order on such evidence as it might have been able to produce before the administrative body. If this were true the defendant's position would be correct, for the hearing which must precede the taking of property is not a mere

form. The carrier must have the right to secure and present evidence material to the issue under investigation. It must be given the opportunity by proof and argument to controvert the claim asserted against it before a tribunal bound not only to listen but to give legal effect to what has been established. But, as construed by the state court, all these rights were amply secured by the statute, which declared that the Commission, "after a full hearing," might require track connection. On such investigation the company could have objected to the sufficiency of the complaint and obtained an order requiring it to be made more specific as to the exact location of the proposed tracks. The defendant was given the benefit of compulsory process to secure and present evidence in its behalf. There was a provision to require the attendance of witnesses, the production of documents and for the taking of testimony by deposition. It also had the right to cross-examine witnesses produced on the part of the Commission and the privilege of offering evidence on every matter material to the investigation.

3. The defendant insists, however, that, no matter how complete the right to be heard before the Commission, the statute having denied all other opportunity for testing the validity of the order in the state courts, furnished an utterly inadequate judicial review because, as the carrier could not anticipate what decision would be made, it was unjust to require it to produce evidence, to show in advance, the unreasonableness of an order, the terms of which were not known. From this it argues that the statute was unconstitutional in so far as it prevented the court from receiving competent and non-cumulative testimony tending to prove that there was no public necessity for making the track connection and that the order was void.

This position would be true if the defendant had not been put on notice as to what order was asked for and

then given ample opportunity to show that it would be unjust or unreasonable to grant it. In this case, and under the statute, it was given such notice. The complaint alleged that some of the towns were important shipping points and that at all of them there was a public necessity that the roads should be connected. The defendant denied each of these allegations. The hearing, both on the law and the facts, was necessarily limited to that issue. There could have been no valid order which was broader than that claim. The defendant was charged with notice that if the allegations of the complaint as to necessity were established the order could then be lawfully granted, unless there was also proof that the cost, in comparison with the receipts, or other fact, made it unjust to require the connections to be made. The carrier was therefore given the right both to meet the charge of public necessity and also to establish any fact which would make it unjust to pass the order for which the complainant prayed. The act further provided that after the administrative body had acted, the carrier should have the right to test the lawfulness and reasonableness of the regulation in the Superior Court, where every error in rejecting or excluding evidence, or otherwise, could be corrected. On that trial the court was not bound by the finding of fact, but, like the Commission, it was obliged to weigh and consider the testimony and to give full effect to what was established by the evidence, since it acted judicially, "under an imperative obligation, with a sense of official responsibility for impartial and right decision, which is imputed to the discharge of official duties." *Kentucky Railroad Tax Cases*, 115 U. S. 321, 334.

4. Having been given full opportunity to be heard on the issues made by the complaint and answer, and as to the reasonableness of the proposed order and having adopted the statutory method of review, this company cannot complain. It had the right to offer all competent

testimony before the Commission, which, in view of the form of proceedings authorized by the statute, acted in this respect somewhat like a master in chancery who has been required to take testimony and report his findings of fact and conclusions of law. The court would test its correctness by the evidence submitted to the master. Nor would there be any impairment of the right to a judicial review, because additional testimony could not be submitted to the chancellor. The statute enlarges what this court has recognized to be proper practice in equity cases attacking such regulations. There the hearing is *de novo* and there is no prohibition in equity against offering all competent evidence to prove that the order was unreasonable. But in *Cinn., N. O. & Tex. Pac.* v. *I. C. C.*, 162 U. S. 184, 196, it was said: "We think this a proper occasion to express disapproval of such a method of procedure on the part of the railroad companies as should lead them to withhold the larger part of their evidence from the Commission, and first adduce it in the Circuit Court. . . . The theory of the act evidently is, as shown by the provision that the findings of the Commission shall be regarded as *prima facie* evidence, that the facts of the case are to be disclosed before the commission." See also *Texas & Pacific* v. *I. C. C.*, 162 U. S. 197, 238, 239; *Missouri &c. Ry.* v. *I. C. C.*, 164 Fed. Rep. 645, 649.

There is no claim here that the evidence rejected by the Superior Court was newly discovered, or that its materiality could not have been anticipated, or that for any reason the defendant had been prevented from submitting to the Commission the testimony it offered in court to show that the cost would be $21,000 instead of $7,500. Nor was there any allegation of surprise, mistake or other extraordinary fact requiring the admission of such evidence in order to preserve the right guaranteed by the Constitution. There is, therefore, no call for a decision as

to whether, under those circumstances, such evidence should be admitted, or the case remanded so that the Commission might consider material and probably controlling testimony which the carrier, without fault on its part, had failed to submit on the first hearing.

5. If, then, the defendant had notice and was given the right to show that the order asked for, if granted, would be unreasonable, it has not in this case been deprived of the right to a hearing. That being so, it leaves for consideration the contention that as a matter of law, the order, on the facts proved, was so unreasonable as to amount to a taking of property without due process of law. This necessitates an examination of the evidence, not for the purpose of passing on conflicts in the testimony or of deciding upon pure questions of fact, but, as said in *Kansas City Railway Co.* v. *Albers Commission Co.*, 223 U. S. 573, 591, from an inspection of the "entire record, including the evidence, if properly incorporated therein, to determine whether what purports to be a finding upon questions of fact is so involved with and dependent upon such questions of law as to be in substance and effect a decision of the latter." *Cedar Rapids Gas Light Co.* v. *Cedar Rapids*, 223 U. S. 655; *Graham* v. *Gill*, 223 U. S. 643. Here the question presented is whether as matter of law the facts proved show the existence of such a public necessity as authorizes a taking of property.

6. Since the decision in *Wisconsin &c. R. R.* v. *Jacobson*, 179 U. S. 287, there can be no doubt of the power of a State, acting through an administrative body, to require railroad companies to make track connection. But manifestly that does not mean that a Commission may compel them to build branch lines, so as to connect roads lying at a distance from each other; nor does it mean that they may be required to make connections at every point where their tracks come close together in city, town and country, regardless of the amount of business to be done,

or the number of persons who may utilize the connection if built. The question in each case must be determined in the light of all the facts, and with a just regard to the advantage to be derived by the public and the expense to be incurred by the carrier. For while the question of expense must always be considered (*Chicago &c. R. R.* v. *Tompkins*, 176 U. S. 167, 174), the weight to be given that fact depends somewhat on the character of the facilities sought. If the order involves the use of property needed in the discharge of those duties which the carrier is bound to perform, then, upon proof of the necessity, the order will be granted, even though "the furnishing of such necessary facilities may occasion an incidental pecuniary loss." But even then the matter of expense is "an important criteria to be taken into view in determining the reasonableness of the order." *Atlantic Coast Line R. R.* v. *North Carolina Commission*, 206 U. S. 1, 27; *Missouri Pacific Ry.* v. *Kansas*, 216 U. S. 262. Where, however, the proceeding is brought to compel a carrier to furnish a facility not included within its absolute duties, the question of expense is of more controlling importance. In determining the reasonableness of such an order the court must consider all the facts,—the places and persons interested, the volume of business to be affected, the saving in time and expense to the shipper, as against the cost and loss to the carrier. On a consideration of such and similar facts the question of public necessity and the reasonableness of the order must be determined. This was done in *Wisconsin R. R.* v. *Jacobson*, in which for the first time, it was decided that a state commission might compel two competing interstate roads to connect their tracks.

It appeared on an examination of the facts in that case that on one of the lines there was an immense supply of wood, for which there was a great demand at points on the other, where there was none, and that if the connecting track was installed there would be a saving in time and

freight on this large volume of business. It also appeared that many cattle were raised on one line, for which there were important markets on the other, and that without the track connection these cattle would have to be hauled over a much longer route, with a resulting loss in weight and value. The advantage to the public was so great that the order requiring the track connection was sustained, in spite of the fact that one of the roads was thereby deprived of the revenue which it would otherwise have received for the longer haul.

But the court said (p. 301) that—

"in so deciding we do not at all mean to hold that under no circumstances could a judgment enforcing track connection between two railroad corporations be a violation of the constitutional rights of one or the other, or possibly of both such corporations. It would depend upon the facts surrounding the cases in regard to which the judgment was given. The reasonableness of the judgment with reference to the facts concerning each case must be a material, if not a controlling, factor upon the question of its validity. A statute, or a regulation provided for therein, is frequently valid, or the reverse, according as the fact may be, whether it is a reasonable or an unreasonable exercise of legislative power over the subject-matter involved. And in many cases questions of degree are the controlling ones by which to determine the validity, or the reverse, of legislative action."

7. The complaint in this case was framed in recognition of this principle and alleged that several of the towns were important shipping points, and that at all of them there was a public demand and a public necessity for track connection between the lines of the several roads. As there is no presumption that connection should be made merely because the roads are in proximity to each other, the burden was on the Commission. If no evidence whatever had been offered the order could not have been granted, or,

if granted, would necessarily have been set aside by the court on the hearing of the Petition for Review because there was no proof of the fact on which only the order could issue taking the defendant's property. The same result must have followed if the testimony that was so submitted to the Commission was insufficient to establish the existence of the public necessity alleged to exist. For, even if under the statute the burden was cast on the defendant when the Petition for Review came on to be heard, the Company could, in view of the limited character of the proceedings permitted, successfully carry that burden by showing to the court that there was before the Commission a lack of evidence to prove the existence of a public necessity. That it was bound to sustain the allegations of the complaint seems to have been recognized by that body, and witnesses in its behalf were examined as to the cost of laying the track and also on the subject of the public demand and necessity. It was testified, however, without contradiction, that there was no necessity for connection at Waverly, Thornton, Farmington or Colfax. They were not asked specifically as to the connections at all of the other towns, though there was proof of the general proposition that if the connections were laid it would shorten the haul between given points in case goods were routed over these tracks. But as to the essential elements of a public necessity there was nothing at all comparable to what was established in the *Jacobson Case.*

There the evidence of necessity was clear and convincing, it being shown that a large volume of business would be served and a great saving in rates effected and loss in value of cattle prevented if the two roads were united by a switch track. Here there is no evidence of inadequate service, no proof of public complaint or of a public demand, and no testimony that any freight had been offered in the past for shipment between the points named, or that any such freight would be offered in the future; nor was there

any evidence whatever as to the volume of freight that would use these tracks or that the saving in freight and time to the shipper would justify the admitted expense to the carrier, whether that expense be $7,500, as found by the Commission, or $21,000, as claimed by the carrier.

Neither do the undisputed facts establish what appeared in *Minneapolis & St. L. Ry.* v. *Minnesota*, 193 U. S. 53, where, under the statute, the order was *prima facie* binding in so far as it required the company to build stations in towns and villages. The court found that this *prima facie* case had not been overcome, and that at the town named there was no station; that in view of the increase in population since a prior refusal to grant the order "it was necessary for the accommodation of the citizens of the town and vicinity, the public at large, and the public necessity required that the company should build and maintain a station house." But here there was no evidence whatever warranting a finding that there was any public necessity for the track connections.

8. The chairman of the Commission dissented as to so much of the order as required connections to be made at Thornton, Waverly, Farmington and Pullman, on the ground that there was no evidence of any public necessity therefor at those points, and it would involve expense which would ultimately have to be paid by the people. And it is practically conceded here that the proof was insufficient—the Attorney General in his brief filed in this case saying that "it must be admitted that the testimony introduced before the Commission as to the character of the traffic, and the nature of the traffic movement in the territory served by the lines of railway is not of a very satisfactory or definite character." He argues, however, that there is nothing to show that the Commission acted arbitrarily and that the carriers ought to have produced their records for the purpose of showing that there was no need for physical connections at the places where the

Commission was seeking to have them installed. That might have been true if the evidence was peculiarly within their knowledge or if the company had been permitted to file a Bill in Equity attacking a final order in the usual and ordinary manner without being restricted by statute as to the evidence that might be considered by the court. In this case the witnesses for the railroad confirmed what had been stated by those for the Commission, and testified that there had been no demand for track connections and that there was no necessity to put them in. The company was not permitted to offer additional testimony for the purpose of establishing its defense, since the statute declared that the validity of the order was to be determined by the court on what had been proved before the Commission. The burden was on the Commission to establish the allegations in the complaint. That body, as well as the carrier, was charged with notice that the reasonableness of the order was to be determined by what appeared at the hearing before it. The insufficiency of the evidence submitted to the Commission could not under this statute be supplied on the judicial review by a presumption arising from the failure of the carrier to disprove what had not been established.

A careful examination of this record fails to show what, if any, business would be routed over these connections, or what saving would come to the public if they were constructed. There is nothing by which to compare the advantage to the public with the expense to the defendant and nothing to show that within the meaning of the law there is such public necessity as to justify an order taking property from the company. The judgment is therefore reversed without prejudice to the power of the Commission to institute new proceedings.

Reversed.